

No. 89-624-CFX
Status: GRANTED

Title: Maislin Industries, U.S., Inc., et al., Petitioners
v.
Primary Steel, Inc.

Docketed:
October 16, 1989

Court: United States Court of Appeals
for the Eighth Circuit

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Counsel for respondent: Schmitt, Edward E., Streiff, Charles
J., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 16 1989	G	Petition for writ of certiorari filed.
3	Nov 14 1989		Order extending time to file response to petition until December 18, 1989.
4	Nov 14 1989		The above extension is for all respondents.
7	Dec 16 1989		Brief of respondent Primary Steel, Inc. in opposition filed.
8	Dec 18 1989		Brief of respondent United States filed.
9	Dec 20 1989		DISTRIBUTED. January 12, 1990
10	Jan 9 1990		Letter from the Solicitor General received and distributed.
11	Jan 16 1990		Petition GRANTED. *****
12	Feb 15 1990		Record filed.
		*	Certified copy of C.A. Proceedings received.
13	Feb 23 1990		SET FOR ARGUMENT MONDAY, APRIL 16, 1990. (3RD CASE)
15	Mar 1 1990		Joint appendix filed.
16	Mar 1 1990		Brief of petitioners Maislin, et al. filed.
14	Mar 2 1990		Brief amicus curiae of Overland Express filed.
17	Mar 2 1990		Brief amici curiae of McLean Trucking Company, et al. filed.
18	Mar 2 1990		Brief amici curiae of Oneida Motor Freight, Inc., et al. filed.
19	Mar 2 1990		Brief amici curiae of Robert Yaquinto Jr., etc., et al. filed.
21	Mar 2 1990	X	Brief amici curiae of National-American Wholesale Grocers' Assn., et al. filed.
20	Mar 23 1990		CIRCULATED.
22	Apr 2 1990	X	Brief amicus curiae of Shippers National Freight Claim Council, Inc. filed.
23	Apr 2 1990	X	Brief amicus curiae of National Industrial Transportation League, et al. filed.
24	Apr 2 1990	X	Brief of respondent United States filed.
25	Apr 2 1990		Lodging received. (10 copies).
26	Apr 4 1990	X	Brief of respondent Primary Steel filed.
27	Apr 4 1990	X	Brief amicus curiae of Supreme Beef Processors, Inc. filed.
28	Apr 9 1990	X	Reply brief of petitioners Maislin, et al. filed.
29	Apr 9 1990		Record filed.
		*	Certified copy of original record received. (Box).
30	Apr 16 1990		ARGUED.
31	Apr 17 1990		Letter from the Solicitor General received and distributed.

89-624 (1)

Supreme Court, U.S.

FILED

OCT 16 1989

JOSEPH F. SPANIOL, JR.,
CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL.,
Petitioners,
v.
PRIMARY STEEL, INC.,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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October 16, 1989

QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its lawful tariff charges, does a shipper have a legal defense that it is entitled to a non-tariff rate which differs from the carrier's published rates filed with the Interstate Commerce Commission, where the ICC advises a court that collection of the applicable and lawful tariff charges would be unreasonable?

PARTIES TO THE PROCEEDING BELOW

Appellants in the court below were Maislin Industries, U.S., Inc., and its subsidiary operating companies, viz., Gateway Transportation, Inc., Quinn Freight Lines, Inc., Richmond Cartage Corporation, MI Acquisition Corporation, and Maislin Transport of Delaware, Inc.

Appellee in the court below was Primary Steel, Inc. The Interstate Commerce Commission was permitted to intervene as a party to the proceeding in support of appellee.

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No. _____

MAISLIN INDUSTRIES, U.S., INC., ET AL.,
Petitioners,
v.
PRIMARY STEEL, INC.,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Maislin Industries, U.S., Inc., et al.*, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on July 17, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 879 F.2d 400 (8th Cir. 1989). It is reproduced as Appendix A hereto.

* Petitioners also include the bankrupt operating subsidiaries of Maislin Industries, U.S., Inc., viz., Gateway Transportation Co., Inc., Maislin Transport of Delaware, Inc., MI Acquisition Corporation, Quinn Freight Lines, Inc., and Richmond Cartage Company.

The memorandum and order of the United States District Court for the Western District of Missouri is reported at 705 F.Supp. 1401 (1988). It is reproduced as Appendix B hereto.

The ICC opinion relied upon by the District Court and Court of Appeals was issued in Docket No. MC-C-10961, *Primary Steel, Inc. v. Maislin Industries, U.S., Inc.* Its unreported decision appears as Appendix C hereto.

GROUND'S FOR THIS COURT'S JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1989. No petitions for rehearing were filed. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C. § 10701(a) provides in relevant part:

A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. § 10761(a) provides:

Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or

service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

FEDERAL JURISDICTION

The cause of action arose under Sections 10761(a) and 11706(a) of Title 49 of the United States Code. Jurisdiction of the United States District Court was invoked pursuant to Section 1337(a) of Title 28 of the United States Code.

STATEMENT OF THE CASE

This case and others like it present an industry-wide dilemma arising from fierce competition among regulated motor common carriers following enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, July 1, 1980. That legislation accomplished major regulatory reform with a general purpose of increasing competition, efficiency, and economy within the motor carrier industry.¹ At the same time, Congress emphasized the need for continued regulation of the motor carrier industry and admonished the Interstate Commerce Commission "to stay within the

¹ See House Report No. 96-1069, June 3, 1980, p. 3, reproduced in 1980 U.S. Cong. and Admin. News Service, at p. 2285.

powers specifically vested in it by the revised law."² As pertinent, entry and rate regulation were scrutinized and carefully revised to provide carriers with greater flexibility within the framework of the law.

The economic forces of supply and demand became operative and carriers began, as hoped, to discount their prices to obtain or retain market share. Some carriers were unable to survive as discounting escalated and for this and undoubtedly other reasons, motor carrier bankruptcies began to mushroom in the early 1980s. Trustees and auditors began sifting through carrier accounts and discovered that many discounts negotiated and billed by carriers, for whatever reason, were never published in tariffs on file with the ICC as required by law, 49 U.S.C. § 10761(a). Properly viewed as monies lawfully due to the estate, trustees commenced actions to recover the difference between the amounts previously received by the carriers and the amounts lawfully due under the applicable tariffs.

This case arises from an action to recover freight rate undercharges for interstate transportation services performed by Quinn Freight Lines, Inc., a subsidiary operating company of Maislin Industries, U.S., Inc. Quinn was a common carrier certificated by the ICC to engage in the transportation of property by motor vehicle in interstate and foreign commerce. Its rates, charges, rules, and regulations governing its services were maintained in published tariffs on file with the ICC. From January 1981 through mid-1983, Quinn transported 1,081 shipments for Primary Steel, Inc., a shipper of various steel products. Throughout

this period, Quinn billed and Primary paid transportation charges which were less than the charges prescribed by Quinn's filed tariffs.

On July 14, 1983, Maislin Industries and its operating divisions filed petitions in bankruptcy. A post-petition audit of the debtors' accounts determined that Quinn had undercharged Primary by \$187,923.36 on the subject shipments. Thereafter, the auditors on behalf of the bankrupt estate and pursuant to authorization of the bankruptcy court issued balance due bills to the shipper for the undercharges. These demands for additional payments were refused and the Maislin estate brought suit against Primary in the United States District Court for the Western District of Missouri to recover undercharges and prejudgment interest pursuant to 49 U.S.C. § 11706(a). Primary defended on the ground that no additional amounts were due because it and Quinn had agreed to the charges already paid. It argued that even though the negotiated rates were not published in a tariff, it would be unreasonable to permit the collection of the filed tariff charges. At the shipper's request, the district court, by order filed September 3, 1985, stayed the proceeding and referred the matter to the ICC for a determination of whether the asserted tariffs were applicable to the involved shipments, whether the tariff rates were reasonable, and whether assessing and rebilling for tariff rates higher than those agreed upon was an unreasonable practice. The court also noted that referral was appropriate because the ICC was considering adoption of a general policy addressing negotiated, unpublished rates which was an issue being raised in numerous similar court actions.

² *Id.*, p. 2293.

While the referred administrative proceeding was pending, the ICC on October 31, 1986, issued a policy statement in Ex Parte No. MC-177, *Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986). That proceeding was instituted at the request of shipper associations whose members were also receiving balance due bills from numerous bankrupt carrier estates for the payment of lawful but unpaid tariff charges. Following public comment, the ICC concluded that the law would not allow adoption of a rule declaring an unfiled, negotiated rate the maximum that could be collected in undercharge litigation. Nevertheless, it expressed the view that the so-called filed rate doctrine had outlived its usefulness in the pro-competitive atmosphere brought about by the Motor Carrier Act of 1980, and that the filed tariff concept should no longer preclude consideration of equitable defenses. By the same token, the Commission recognized that it had no authority to waive motor carrier undercharges or, in the absence of court referral, even entertain a proceeding involving rates on past shipments. Therefore, it offered to render advisory opinions to referring courts in which it would consider all the circumstances in a given case and advise the court whether an unfiled negotiated rate or a lawful tariff rate should apply. The Commission acknowledged that the referring court could accept or reject its opinion.

Numerous courts began referring negotiated rate undercharge cases to the ICC which conducted evidentiary proceedings through the submission of written verified statements. The referred Primary proceeding was processed in this manner, and on January 19, 1988, the ICC issued its opinion that the parties had negotiated a rate which although not pub-

lished and filed with the ICC was the rate billed by Quinn and paid by Primary. It concluded that collection of the tariff charges would constitute an unreasonable practice. The ICC never found that the tariff rates were unreasonable or inapplicable although the parties submitted evidence on these issues. Primary has since abandoned any contention in these respects.

Ruling on cross-motions for summary judgment, the district court found that the ICC determination was a matter within its primary jurisdiction and was entitled to special deference unless arbitrary, capricious, contrary to law, or unsupported by substantial evidence. Concluding that ICC consideration of equitable defenses was consistent with the law and its findings were supported by substantial evidence, the court affirmed the ICC determination that collection of the tariff charges would be an unreasonable practice. In light of these conclusions, the district court did not address Maislin's request for prejudgment interest. Judgment was entered for Primary on July 25, 1988.

On August 19, 1988, Maislin filed its notice of appeal to the United States Court of Appeals for the Eighth Circuit. The ICC was permitted to intervene in support of defendant and the case was duly briefed, argued and submitted for decision to a three judge panel. On July 17, 1989, the Court issued its opinion affirming the judgment and conclusions of the district court that the issue considered is within the ICC's primary jurisdiction and that equitable defenses may be properly considered. The Court found it unnecessary to address Maislin's request for prejudgment interest.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Federal Courts Are Diametrically Split On the Proper Construction of the Interstate Commerce Act

But for the ICC's advisory opinion and its MC-177 general policy statement, the outcome of the proceeding below would have been undoubtedly different and would not warrant this Court's attention. It has been settled for over seven decades that unless the filed tariff itself is found unlawful, the legal rights of a shipper and carrier are governed by its terms and deviation therefrom is not permitted under any pretext. *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494 (1915) and *Square D Company v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986). Prior to the ruling below, the Eighth Circuit, like every other federal circuit, had adhered to the view that the requirements of the filed rate doctrine prohibit all equitable defenses including mistake, misrepresentation or fraud. *Missouri Pacific R. Co. v. Rutledge Oil Co.*, 669 F.2d 557 (1982) and *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (1986).

The ICC policy statement purporting to reinterpret the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, and the effect of its opinions in individual proceedings have spawned mass confusion and inconsistent rulings at all levels of the federal courts and in the state courts as well. The ruling below that the matter of equitable defenses is within the ICC's primary jurisdiction squarely conflicts with the recent decision of the United States Court of Appeals for the Fifth Circuit in *Matter of Caravan Refrigerated Express, Inc.*, 864 F.2d 388 (1989), rehearing denied March 1, 1989, petition for writ of certiorari pending in No. 88-1958, *sub nom. Supreme Beef Processors,*

Inc. v. Yaquinto. That case involves an action to recover a bankrupt motor carrier's tariff charges in which the shipper contended that recovery was impermissible in view of agreed-to but unfiled rates. The district court refused the shipper's request for referral to the ICC on the ground that equitable defenses are barred as a matter of law regardless of the ICC policy statement. Judgment was entered for the carrier for recovery of the prescribed tariff charges. The Fifth Circuit affirmed holding that the asserted defense is barred as a matter of law and as such is not an issue requiring ICC technical expertise.

Although the Eighth and Fifth Circuits are the only federal circuits that have addressed this question,³ most of the other circuits are presently considering appeals embracing the same issue. A list of those proceedings and their status is included in Appendix D hereto.

Resolution of this issue has been even more diverse in the federal district and bankruptcy courts. The negotiated rate issue exists in literally hundreds of cases pending or decided in the federal courts throughout the country. Thus far, the decisions reveal a wide split of opinion, even within the same circuit. At pre-trial stages, the rulings fall into two categories: (1) negotiated rates defense calls into play the ICC's primary jurisdiction requiring administrative reference; or, (2) such a defense is statutorily barred and

³ The Eighth Circuit reached the same conclusion it did below in *INF, Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 which was argued the same day as *Maislin*, but not issued until August 3, 1989. A suggestion for rehearing *en banc* was denied on September 15, 1989.

referral would serve no useful purpose.⁴ Examples of reported court decisions granting referral are listed in Appendix E hereto, and those denying referral in Appendix F hereto. In addition, courts which have initially referred this issue are split on the effect of an ICC advisory opinion upon return to the court. Some courts, as here, have deferred to and accepted such opinions, as illustrated in Appendix G, while others have rejected them as inconsistent with the law, as reflected in Appendix H. Though not intended to be all inclusive, the lists are illustrative of the widespread conflict among the federal courts.

In these circumstances, it is appropriate for this Court to exercise its supervisory powers and resolve the proper interpretation of the Interstate Commerce Act to bring about the uniformity the Act was originally designed to achieve. The rate and tariff provisions of the Act have been the linchpin of the regulatory scheme since its inception and the issue presented is of vital significance to shippers, carriers and the Interstate Commerce Commission in the proper administration of the Act. Resolution of this matter should have the practical effect of terminating or narrowing the issues in the plethora of pending or contemplated litigation of this issue.

The decisions of the Fifth and Eighth Circuits reach this Court following different procedural routes - one invoking administrative reference and the other re-

⁴ At least two courts of appeals have held that the refusal to refer this issue to the ICC is not reviewable. See *Feldspar Trucking Co. v. Greater Atlanta Shippers Assoc.*, 849 F.2d 1389 (11th Cir. 1988) and *Delta Traffic Services, Inc. v. Occidental Chemical Corp.*, 846 F.2d 911 (3rd Cir. 1988).

fusing to do so. The Court is called upon to determine which path was the correct one under the statutory scheme. A proper and uniform interpretation of the Interstate Commerce Act would be facilitated by a simultaneous review of this issue in both decisions. For this reason petitioners suggest that the Court grant both petitions and consolidate the cases for argument.

B. The Ruling Below Conflicts with Decisions of This Court

(1) Equitable Defenses Are Barred As a Matter of Law

The issue posed is certainly not novel and though it has been presented in numerous cases with varying degrees of complexity, it is surprisingly simple. The common factual thread involves an incorrect billing by the carrier at below tariff rates which resulted from an agreement of the parties or an erroneous rate quotation by the carrier, the failure to publish such rates in a tariff on file with the ICC, and the subsequent rebilling at the applicable tariff rate.

The touchstone of the controversy lies in 49 U.S.C. § 10761(a), which, like its predecessor sections, require that motor common carriers collect and shippers pay only the filed tariff rate. The statute and judicial construction thereof form the basis of the filed rate doctrine and has been governing law since the decision in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), where it was held that the Act extinguished any common law right to a reasonable rate and substituted therefor a right to whatever rate was duly filed with the ICC, unless that rate was determined to be unreasonable or discriminatory. This Court has likewise made clear that equitable defenses to collection of the filed tariff rate are barred by the

statute. Thus, in *Louisville & Nashville R. R. Company v. Maxwell*, *supra*, the Court relying on a substantial body of precedent at the time, stated:

Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. 35 S.Ct. at 495.

The harsh realities of this doctrine have been repeated by the Court on numerous occasions since that time and through its most recent pronouncement in 1986 in *Square D Company*, *supra*. Unless the filed rate is found by the ICC to be unreasonable, it must be collected. Notwithstanding that the parties submitted evidence in the ICC proceeding addressing Primary's contention that the tariff rates of Quinn were unreasonable, the ICC made no such finding. Consequently, the tariff rates were the duly submitted, lawful rates under the Act. See *Square D*, 476 U.S. at 417. The ruling below squarely conflicts with applicable decisions of this Court.

(2) The ICC Opinion Does Not Make Viable A Statutory Equitable Defense

In order to avoid *Maxwell* and its progeny, the Court of Appeals relied on the ICC's opinion that the collection of tariff charges would be an unreasonable practice. This is the crux of the case. Although the decision below is premised on the doctrine of primary jurisdiction, proper resolution of the issue presented does not require resort to this doctrine at all. Rather, the question is whether shippers have a legal right to a non-tariff rate. If the remedy does not exist as a matter of law, the primary jurisdiction of the ICC cannot be implicated to create one.

The ICC unreasonable practice finding and the lower court's deference thereto were predicated on the requirement of 49 U.S.C. §10701(a) that a "rate . . . or practice . . . must be reasonable." Whether or not the ICC has primary jurisdiction to determine the reasonableness of a carrier's practices does not address whether a shipper has a legal right to a non-tariff rate, which is a question of law. The effect of the decision below is to permit the doctrine of primary jurisdiction to create a statutory remedy where none independently exists in either the courts or the ICC.

The same type of judicial-administrative ping pong employed below was struck down in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) and *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). *Montana-Dakota* was a suit in a United States District Court by Montana, a purchaser of electricity from Northwestern, at rates filed with the Federal Power Commission under the Federal Power Act. The gravamen of the complaint was

that the rates violated the Act in that they were unreasonably high, that Northwestern had misled the FPC into accepting the rates, that the rates had therefore been improperly established, and that Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect. Applying the filed rate doctrine, this Court held that the complaint failed to state a cause of action, for the reason that one "can claim no rate as a legal right that is other than the filed rate, . . . and not even a court can authorize commerce in the commodity on other terms." 341 U.S. at 251.

Dealing with a dissenting opinion that the issue of rate reasonableness could be referred to the FPC, the Court noted that referral of particular issues to an administrative agency might be appropriate where the plaintiff "concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary." 341 U.S. at 253. However, under the filed rate doctrine a plaintiff has no cause of action for damages grounded on a claim that he has a right to a rate other than the filed rate. Hence, Montana's claim that, but for the fraud alleged, it would have paid a lower rate failed to state a cause of action. This Court said:

Here the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remediable fraud. 341 U.S. at 253-254.

In *T.I.M.E.*, motor carriers sued the United States, *qua* shipper, to collect freight charges. The government defended on the ground that the rates upon which they were computed were unjust and unreasonable. The district court granted summary judgment to the carriers, but the court of appeals reversed on the ground that the government was entitled to an ICC determination of the reasonableness of the tariff rates, notwithstanding the ICC's inability to award reparations on motor carrier rates for past shipments.

Relying on *Montana-Dakota*, this Court reversed, holding that the Motor Carrier Act did not "give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert 'unreasonableness' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

As here, it was asserted that a statutory cause of action or defense existed by virtue of the language in former Section 216(b) of the Act (the predecessor to present Section 10701(a)) requiring that rates, and, as here pertinent, practices be reasonable. The Court held, however, that the statutory duty to establish and observe reasonable rates and practices creates only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right." 359 U.S. at 469. Then as now, the general requirement imposed on carriers to observe reasonable practices provides shippers no cause of action or defense for a violation of that duty.

The Court also addressed the contention that the Motor Carrier Act preserved a pre-existing common law right to a reasonable rate. Relying on *Texas &*

Pacific R. Co. v. Abilene Cotton Oil Co., *supra*, it concluded that under the statutory scheme only the ICC could determine the reasonableness of a rate and therefore any common law right was necessarily extinguished as "absolutely inconsistent" with the statute. 359 U.S. at 473. Nevertheless, the government urged that such a remedy would be consistent with the statute when coupled with referral to the ICC for a determination of the reasonableness issue as an adjunct to a judicial proceeding. The Court rejected this contention stating:

To permit a utilization of the procedure here sought by the Government would be to engage in the very "improvisation" against which this Court cautioned in *Montana-Dakota*, *supra*, in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly. In the absence of the clearest indication that Congress intended that the Motor Carrier Act should preserve rights which could be vindicated only by such an improvisation, we must decline to consider a defense which involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide. * * * [footnote and citation omitted]. 359 U.S. at 475.

The holding in *T.I.M.E.* left purchasers of motor common carriage without any remedy whatever with respect to unreasonable rates on past shipments. In 1965, Congress created one with the enactment of Pub. L. 89-170, 79 Stat. 651, September 6, 1965. The law amended then Section 204a of the Act to provide

a cause of action against motor carriers for the recovery of "reparations", defined as "damages resulting from charges for transportation services to the extent that the Commission upon complaint made as provided in Section 216(e) of this Part, . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." Section 204a(2) and (5).⁵

There was no remedy for the exaction of unreasonable rates by a motor carrier until the Congress created one in 1965. "It necessarily follows that [that remedy] provide[s] the sole and exclusive remedy for excessive charges." *Mohasco Industries, Inc. v. Acme Fast Freight Inc.*, 491 F.2d 1082, 1084 (5th Cir. 1974). To the same effect is *U.S. v. Associated Transport*, 505 F.2d 366 (D.C. Cir. 1974). As the court there said:

The frame and preamendment history of the Motor Carrier Act, as *T.I.M.E.* explains, evince a congressional intent to secure the reasonableness of rates through the administrative processes it prescribes, and to exclude liability of motor carriers to shippers on account of excessive rate-charging in the

⁵ The Interstate Commerce Act was recodified in 1978. See P.Law 95-473, 92 Stat. 1337, October 17, 1978. The revisions effected no substantive change. The pertinent provisions of former Section 204a, 49 U.S.C. § 304a, now appear in 49 U.S.C. § 11705(b)(3) and § 11706(c)(2). The recodified language is not a model of clarity, but it may not be construed as making any substantive change in the prior law. Examination of the prior language is required to determine the intent of Congress. *Trailer Marine Transport Corp. v. Federal Maritime Commission*, 602 F.2d 379, at 383, n. 18 (D.C. Cir. 1979).

past. By the 1965 amendment, Congress has relented somewhat, but only to the extent of admitting the current reparations procedure. [footnote omitted] 505 F.2d at 369.

The language of the 1965 law is very specific in providing a reparations remedy only where the ICC finds the rates contained in a tariff to be unreasonable. The recodified language of Section 11705(b)(3) omits the reparations definition, but likewise limits the remedy to unlawful rates. The narrow reparations remedy cannot be read to provide a cause of action or defense for other statutory violations such as an unreasonable carrier practice. In this context, the Motor Carrier Act is in stark contrast with former Parts I and III of the Act dealing with rail and water carriers, respectively, which give a right of action to shippers against carriers for damages resulting from any act or omission of such carriers in violation of the Act. 49 U.S.C. § 11705(b)(2). The distinction is critical. As the Court observed in *T.I.M.E.*:

To hold that the Motor Carrier Act nevertheless gives shippers a right of reparation with respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act. 359 U.S. at 471.

T.I.M.E. squarely stands for the proposition that while the Act requires practices to be reasonable, it does not provide shippers a cause of action or defense against a motor carrier for violation of that duty. To that extent, no subsequent legislation has altered that holding.

(3) The Statute Extinguished Any Common Law Remedy for the Unreasonable Practice Claimed Here

T.I.M.E. also rejected the contention that the Act preserved a pre-existing common law remedy for an unreasonable charge as being "absolutely inconsistent" with the statute's design. 359 U.S. at 473. The same conclusion is even more compelling with respect to a common law claim premised on allegations of an unreasonable practice of the nature involved here. Compare *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

Assuming that the challenged "practice" is one embraced by Section 10701(a),⁶ only the ICC could determine its reasonableness. As a result, any common law right is necessarily extinguished. 359 U.S. 473. *T.I.M.E.* makes clear that such a remedy cannot be resurrected by the referral mechanism to accomplish "indirectly what Congress has not chosen to give it the authority to accomplish directly." 359 U.S. at 475.

Moreover, as the Court noted in *Hewitt-Robins*, survival of a common law claim depends on the exercise

⁶ This is no small assumption. The practice declared unreasonable is a statutory command, i.e., the collection of tariff charges for which a federal cause of action is specifically provided. 49 U.S.C. §§ 10761(a), 11706(a). The ICC's declaratory finding is the practical equivalent of a waiver of these provisions, an exercise which is well beyond its jurisdiction.

of the remedy upon the statutory scheme. If the remedy is inconsistent with that scheme it does not survive. 371 U.S. at 89. Recognition of a cause of action or defense for negotiated rate agreements would completely undermine the regulatory scheme embodied by the Interstate Commerce Act.⁷ To permit the parties to ignore the tariff and retain the benefits of a private rate agreement would gut the statutory tariff filing and adherence requirements which, as then Judge Scalia put it in *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C.Cir. 1986), are "utterly central" to the Act.

This is not to say that carriers may act with impunity, or that shippers have no means of protection against the practices alleged here. Prior to shipment, shippers may verify that the quoted rates are filed rates by resort to the published tariffs for which they are charged with knowledge in any event. Subsequent to shipment, shippers have a remedy to challenge the published tariff and recover reparations if the tariff is found unlawful. In addition, the statute's broad remedial provisions are designed to ensure the integrity of the tariff system and overall purpose of the Act. Thus, criminal and civil liability is imposed on carriers and shippers alike for knowing deviation from the filed tariff rate. 49 U.S.C. §§ 11902, 11903, 11904. The Commission also has broad enforcement powers over motor carriers to require compliance with their tariffs. 49 U.S.C. §§ 11701, 11702. This statutory scheme is intentional in its exclusion of a private

⁷ The ICC has attempted to accomplish precisely that result. In every case referred to it thus far the Commission has found that collection of the lawful tariff charge is unreasonable where a negotiated but unfiled rate exists.

remedy which would allow certain shippers to recoup or retain the fruits of their special agreements to the disadvantage of other shippers not so fortunate.

C. No Relevant Statutory Change Permits Equitable Defenses

The Motor Carrier Act of 1980 did not alter the requirements of Section 10761(a) or make any other relevant statutory change authorizing the result below. Nevertheless, in upholding the ICC's "reinterpretation" of the filed rate doctrine, the Court of Appeals relied on the general pro-competitive thrust of the reform legislation.

This Court recently made quite clear that the general purpose of the 1980 Act is insufficient to overcome the strict requirements and harsh results of the filed rate doctrine. As stated in *Square D, supra*, "... harmony with a general legislative purpose is inadequate for that formidable task." 476 U.S. at 420. If the reasons underlying the filed rate doctrine are no longer sound, it is up to the legislature to change that policy.

This pronouncement takes on particular importance where, as here, Congress has carefully re-examined this area of the law and provided a specific statutory framework under which shippers and carriers can conduct business. For example, the 1980 legislation relaxed entry requirements, 49 U.S.C. § 10922; broadened the sphere of contract carriage, 49 U.S.C. § 10923; allowed carriers to operate as both common and contract carriers without prior approval of their dual status, 49 U.S.C. § 10930(a); created a zone of rate freedom to allow carriers to raise and lower rates without ICC interference, 49 U.S.C. § 10708; and en-

abled carriers to establish rates based on limited liability without prior ICC approval, 49 U.S.C. § 10730(b).

Since 1980, pursuant to specific statutory provisions, the Commission has undertaken to provide carriers with greater flexibility. It has, for example, relieved motor contract carriers, on an industrywide basis, of the requirement that they file rates with the Commission, *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150 (1983), affirmed *sub nom. Central & Southern Motor Freight Tariff Assn. v. United States*, 757 F.2d 301 (D.C. Cir. 1985). It has also allowed motor contract carriers to obtain permits to serve entire classes of unnamed shippers. *Issuance of Permits Authorizing Industrywide Service*, 133 M.C.C. 298 (1983), appeal dismissed in *American Trucking Associations, Inc. v. United States*, 747 F.2d 787 (D.C. Cir. 1984). It has actively encouraged the discounting practices of motor common carriers, *Lawfulness of Volume Discount Rates, Motor Common Carriers*, 365 I.C.C. 711 (1982). It also adopted a general rule allowing motor common carriers to respond quickly to market demand by filing reduced rates on one day's notice and increased rates on five days' notice. *Short Notice Effectiveness for Independently Filed Rates*, 1 I.C.C.2d 146 (1984), affirmed *sub nom. Southern Motor Carriers Rate Conference v. U.S.*, 773 F.2d 1561 (11th Cir. 1985).

Thus, Congress provided, either directly or through delegation to the ICC, the tools necessary to achieve the goals embraced by the national transportation policy. It did not, however, evince an intent to permit carriers, shippers, or the ICC to subvert the statutory tariff adherence requirements for motor common car-

riers and their customers. Had it desired to carve exceptions into the requirements of section 10761(a), it would have done so. See, for example, 49 U.S.C. § 10761(b), authorizing the ICC to relieve motor contract carriers from rate filing requirements;⁸ and 49 U.S.C. § 10735, authorizing motor common carriers of household goods to quote binding estimates pursuant to specific statutory and regulatory procedures. The requirement that motor common carriers and shippers adhere to the published tariff rate is fundamental to the overriding purposes of the Act. To infer an intent to eradicate this doctrine is to ignore the plain language of the statute.

CONCLUSION

The issue presented in this case has already been answered by the precedent of this Court and if there is to be change in the law it should be through legislative action. However, some lower courts, including the Court of Appeals for the Eighth Circuit, have created a new judicial remedy. Other lower courts continue to follow the law applicable to collection of filed rates. The result is conflicting decisions by the bankruptcy courts, the federal district courts and the Courts of Appeals for the Fifth and Eighth Circuits.

For the reasons set forth herein, petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit, and upon review of the Record in that Court its judgment be reversed and the cause remanded to it with directions

⁸ Section 10761(b) was a part of the statutory scheme prior to 1980, but was not implemented by the ICC to apply to all motor contract carriers until after the 1980 Act.

that it be remanded to the United States District Court for entry of judgment in favor of Maislin and instructions to rule on the request for prejudgment interest.

Respectfully submitted,

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October 16, 1989

APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 88-2267

Maislin Industries and U. S. Inc.,
Appellants,

v.

Primary Steel, Inc.,
Appellee.

Submitted: January 11, 1989
Filed: July 17, 1989

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior
Circuit Judge, and WOLLMAN, Circuit Judge.

**Appeal from the United States District Court for the
Western District of Missouri.**

JOHN R. GIBSON, Circuit Judge.

This case presents the issue of whether the "filed rate doctrine," which requires a motor carrier to collect the rate published in a filed tariff, obliges Primary Steel, Inc. to pay Maislin Industries and U.S., Inc. an amount greater than that which the parties negotiated. The district court affirmed a ruling of the Interstate Commerce Commission finding it unreasonable under 49 U.S.C. § 10701 for Maislin to recover tariff charges higher than those agreed to

by the parties. On appeal, Maislin challenges the district court's referral of the issue to the ICC, its subsequent affirmance of the ICC decision, and its denial of prejudgment interest. We affirm the judgment of the district court.¹

Maislin brought this action against Primary Steel to recover freight tariff charges in the amount of \$187,923.36. Quinn Freight Liners, Inc., a division of Maislin, made 1,081 shipments of steel for Primary Steel over a three year period. Pursuant to 49 U.S.C. § 10761 (1982), Maislin had filed tariffs with the ICC containing rates and charges applicable to the transportation services provided for Primary Steel. Primary Steel and Maislin, however, had negotiated a shipment rate for an amount below the filed tariff rate, with the understanding that Maislin would file the lower negotiated rate with the ICC. Maislin never filed this negotiated rate with the ICC.

Maislin and its divisions later initiated Chapter 11 bankruptcy proceedings, and the alleged undercharges were discovered by an audit agency appointed by the bankruptcy court. The claimed undercharges of \$187,923.36 represent the difference between the negotiated rates paid by Primary Steel and the tariff rate filed by Maislin with the ICC.

The district court relied on the doctrine of "primary jurisdiction," referring to the ICC the questions of whether Maislin's freight rates and charges were unreasonable and whether Maislin's practice of assessing and rebilling Primary Steel for tariff rates higher than those originally negotiated by the parties constituted an unreasonable practice in violation of 49 U.S.C. § 10701(a).

The ICC relied upon its earlier decision in *National Indus. Transp. League—Petition to Institute Rulemaking on*

¹ The Honorable John W. Oliver, Senior United States District Judge for the Western District of Missouri.

Negotiated Motor Common Carrier Rates, Ex Parte No. MC-177, 3 I.C.C.2d 99 (1986) (hereafter *Negotiated Rates*), and held that it could inquire into whether the imposition of undercharges would be an unreasonable practice under 49 U.S.C. § 10701(a).² Making extensive factual findings, the ICC determined that Maislin had quoted a rate other than a tariff rate to Primary Steel, that an agreement had been reached between the parties, and that Primary Steel had, in fact, reasonably relied on the rate quotation. The ICC concluded that Maislin would commit an unreasonable practice in requiring Primary Steel to pay undercharges for the difference between the negotiated rates and the tariff rates.

Both parties moved before the district court for summary judgment, Primary Steel relying on the ICC decision, and Maislin contending that the ICC decision was not binding, but only an advisory opinion, and that its decision was contrary to law. The district court found that the ICC decision resolved a question within its primary jurisdiction because the issue presented required an inquiry into the lawfulness of a carrier's practice, and that it was appropriate to defer to the special expertise and administrative

² 49 U.S.C. § 10701(a) (1982) provides:

A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission . . . must be reasonable.

49 U.S.C. 10704(a)(1) (1982) further provides:

When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation . . . or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation.

discretion of the ICC. See *Iowa Beef Processors, Inc. v. Illinois Centr. Gulf R.R. Co.*, 685 F.2d 255, 259 (8th Cir. 1982). The district court concluded that the ICC decision, therefore, should be accorded substantial deference, and not be set aside unless it exceeded the ICC's statutory authority or was unsupported by substantial evidence. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-21 (1966).

The district court recognized that in the past courts have not permitted deviation from the filed rate required under 49 U.S.C. § 10761. See, e.g., *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915). Further, the ICC has also refused to allow the waiver of undercharges based on ignorance or carrier misquotations. The district court, however, rejected the applicability of the filed rate doctrine, relying on the 1986 ICC policy change announced in *Negotiated Rates*, 3 I.C.C.2d 99. *Negotiated Rates* allows the ICC, upon a court's request, to determine whether collection of undercharges would constitute an unreasonable practice under 49 U.S.C. § 10701. The district court observed that the ICC had not abolished the section 10761 requirement that mandates carriers to charge the tariff rate. Rather, it changed its policy on enforcing the "unreasonable practice" provision of section 10701(a), by allowing the consideration of equitable defenses. The court held that nothing prohibits the ICC from changing its policy and that this change in policy was justified and consistent with its practices under the Interstate Commerce Act. Finally, the district court concluded that the ICC's determination, that a negotiated rate existed and that collection of the alleged undercharge would be an unreasonable and unlawful practice, was supported by substantial evidence. Summary judgment was accordingly granted in favor of Primary Steel.

I.

Maislin first argues that the issue before the district court was not within the ICC's primary jurisdiction. The issue before the ICC here was whether Maislin's practice of assessing and rebilling Primary Steel for the filed tariff rate, which is higher than the rate negotiated and paid by Primary Steel, constituted an unreasonable practice in violation of 49 U.S.C. § 10701(a). Maislin contends that this issue is a question of law and within the competence of the judiciary. In its Order of Referral, the district court, citing *Iowa Beef Processors*, 685 F.2d at 259, held that the doctrine of primary jurisdiction required it to refer the matter to the ICC, as "the claim presented to the court requires an inquiry into the lawfulness of a carrier's practice." The court concluded that this "policy decision should be dealt with uniformly and with reference to the underlying reasons and policies for the regulations," and that it is therefore "appropriate that we defer to the special expertise, competence, and administrative discretion possessed by the ICC." In its order granting Primary Steel's motion for summary judgment, the district court rejected Maislin's contention that it improperly referred the issue to the ICC.

We are satisfied that the reasonableness of Maislin's billing practices is a matter properly within the ICC's primary jurisdiction. The Supreme Court in *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65 (1956), held that the ICC has primary jurisdiction over any matter that "raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act." Further, the doctrine of primary jurisdiction should be exercised if the issues in the proceeding "turn on a determination of the reasonableness of a challenged practice," or raise a "question of the validity of a rate or practice." *Nader v. Allegheny Airlines, Inc.*,

426 U.S. 290, 304-06 (1976). In *Iowa Beef Processors*, 685 F.2d 255, we held that the doctrine of primary jurisdiction dictated that the ICC determine, in the first instance, whether a practice provided for in a carrier's tariff is reasonable. See also *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-432 (1940); *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982).

The Eighth Circuit has not specifically addressed the application of the primary jurisdiction doctrine in a case involving an allegation of unreasonable collection of undercharges. This issue, however, was addressed by the Eleventh Circuit in *Seaboard System R.R. Co. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986), where the court held that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." Likewise, a majority of the lower federal courts presented with similar claims for undercharges have referred the issue to the ICC. See, e.g., *Delta Traffic Serv. Inc. v. Marine Lumber Co.*, 683 F. Supp. 754 (D. Or. 1987); *Motor Carrier Audit & Collection Co. v. Family Dollar Stores, Inc.*, 670 F. Supp. 644 (W.D.N.C. 1987); *In re Tucker Freight Lines, Inc.*, 85 Bankr. 426 (W.D. Mich. 1988).³

³ In *Negotiated Rates*, the ICC addressed the scope of its primary jurisdiction:

[T]he Commission lacks initial jurisdiction to entertain challenges to the reasonableness of motor carrier rates charged in the past, or to order the waiver of undercharges. However, this does not mean that we lack authority to address the question of what rate should have been charged by a carrier (the tariff rate, the negotiated rate or some other rate) if the carrier brings an action for undercharges in district court, 49 U.S.C. §§ 10705(b)(3), 11706, and the court refers the question of whether the collection of undercharges would be an unreasonable practice to us under the doctrine

The decision of whether to allow Maislin to collect undercharges directly involves the reasonableness of Maislin's billing practices. This determination requires the consideration of the facts and circumstances regarding both the existence of the alleged negotiated rate and the reasonableness of allowing Maislin to collect the undercharges. Such matters involve the special expertise of the ICC. We affirm the district court's holding that the ICC had primary jurisdiction to determine the reasonableness of Maislin's billing practices.

II.

The central argument asserted by Maislin is that the filed rate doctrine bars consideration of equitable defenses. Maislin argues that the district court erred in adopting the ICC decision which considered equitable defenses and found that it would be an unreasonable practice in violation of 49 U.S.C. § 10701 for the carrier to recover tariff charges that were higher than the charges previously agreed to by the carrier and the shipper.

Section 10761(a) of the Interstate Commerce Act requires that common carriers collect the rate published in their tariffs. 49 U.S.C. § 10761(a). In the past, a party's mistake or ignorance of the applicable tariff rate, or even carrier misquotation of the correct tariff rates, was not an excuse for paying less than the tariff rate. See, e.g., *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). This rule, known as the "filed rate doctrine," was enforced to uphold the anti-discriminatory goals of the public tariff filing system, whereby every shipper could be assured that it was paying the same rate as other shippers for common carriage service. Requiring strict adherence to the tariff was intended to avoid intentional tariff mis-

of primary jurisdiction.

³ I.C.C.2d at 106-07.

quotation of rates as a means to offer secret discounts to particular shippers. See S. Rep. No. 46, 49th Cong., 1st Sess. 181, 188-90, 198-200 (1886); *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1230-31 (7th Cir. 1982).

In *Buckeye Cellulose Corp. v. Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom. Seaboard System R.R. Co. v. United States*, 794 F.2d 635 (11th Cir. 1986), the ICC modified its interpretation of the filed rate doctrine to permit equitable defenses in a tariff applicability case involving a rail carrier. Subsequently, in *Negotiated Rates*, the ICC addressed complaints by shippers that some motor carriers were abusing rate flexibility newly established by the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, by exploiting the ICC's traditional strict enforcement of filed tariffs.⁴ Typically, shippers complained that motor carriers quoted and billed rates lower than those set forth in the tariffs and then later the carrier, or more typically its trustee in bankruptcy, would bill the shipper at the higher tariff rate. The ICC concluded: "our former policy of penalizing shippers for carriers' mistakes regardless of the circumstances is unnecessary and inappropriate to deter discrimination under today's statutory scheme." *Negotiated Rates*, 3 I.C.C.2d at 105. The ICC stated that by evaluating the circumstances of each case, it could determine if the carrier's actions constituted an "unreasonable practice."

Maislin argues that the ICC's interpretation of the filed rate doctrine in *Negotiated Rates* is contrary to law, and that the district court is precluded from applying that interpretation because of prior judicial precedent, which strictly construed section 10761 as requiring the filed rate doctrine. See, e.g., *Maxwell*, 237 U.S. 94; *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986). Maislin

⁴ The Motor Carrier Act of 1980 relaxed regulatory requirements and ICC oversight, thereby allowing far more pricing freedom and increasing competition among carriers.

relies on several Supreme Court cases which strictly construed the filed rate doctrine. In *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), the Supreme Court held that shippers could not use antitrust law to challenge the legality of tariff rates filed with the ICC, even where the carrier conspired to fix rates in violation of the Sherman Act, because the rates had been approved by the ICC. *Id.* at 415-16. In *Maxwell*, the Supreme Court held that the lawfully filed rate of the carrier must be charged by the carrier and paid by the shipper, and that a shipper is not excused from paying the full amount of the filed tariff. In both *Square D* and *Maxwell*, however, the rates enforced by the Court were presumptively reasonable because they had been approved by the ICC. Therefore, collection of those rates was mandated by law. Neither case concerned rates or practices deemed to be unreasonable by the ICC. The "courts have never held that the Commission lacks authority to prohibit the unreasonable collection of undercharges" under section 10701. *Seaboard*, 794 F.2d at 638 (emphasis added).

Section 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the Interstate Commerce Act elevating this section over section 10701, which requires that tariff rates be reasonable. When conflicts between the two provisions arise, "it is not for . . . [courts] to place enforcement of one doctrine above the other." *In re Tucker Freight Lines*, 85 Bankr. at 429. Instead, the proper authority to harmonize these competing provisions is the ICC. *Seaboard*, 794 F.2d at 638. The approach taken by the ICC does not abolish the filed rate doctrine, but merely allows the ICC to consider all of the circumstances, including equitable defenses, to determine if strict adherence to the filed rate doctrine would constitute an unreasonable practice.

Our position is supported by similar cases from other circuits involving the filed rate doctrine. In *Seaboard*, 794

F.2d 635, the court affirmed the ICC's decision that a railroad's recovery of undercharges would be an unreasonable practice, prohibited by 49 U.S.C. § 10701, where the carrier's tariff was unclear to the ordinary user and the shipper relied on the carrier's quotation of the applicable rate. The court concluded:

The Interstate Commerce Act, as amended, still embodies the policies of nondiscrimination and uniformity. The primary authority to give effect to those policies, though, is reposed in the ICC. * * * The Commission in this case merely refused to allow the carrier to collect its undercharge when there was no evidence that the carrier intentionally or knowingly undercharged, when waiving the undercharges was unlikely to encourage carriers to indulge in intentional discriminatory rate "misquotations," and when the shipper relied upon the carrier's continuing conduct in misleading the shipper as to the applicable rate under a confusing tariff. The Commission did not abolish the requirement of 49 U.S.C. 10761(a) that carriers must charge the tariff rate.

Seaboard, 794 F.2d at 638 (citations omitted).

Also, in *Western Transp. Co.*, 682 F.2d at 1231, the Seventh Circuit held that although it was not empowered to consider equitable defenses by waiving the filed rate doctrine:

it does not follow that the shipper is necessarily without any remedy in a case like this. A tariff provision has to be reasonable. See 49 U.S.C. § 10704(a). If it is not, it violates the statute; and the Commission, either on its own initiative or on complaint, "shall take appropriate action to compel compliance with" the statute. 49 U.S.C. § 11701. If the notation requirement is, as it appears to be, entirely pointless, the Commission

can be expected to set aside this part of the tariff * * * . * * * Wilson should have done what Iowa Beef Processors, Inc., another of Western's customers, did when sued by Western in bankruptcy court on the very tariff in issue on this case—ask for stay of the court proceedings and then ask the Commission to declare the notation requirement unreasonable.

Thus, the district court is required to enforce the tariff provisions of section 10761(a), unless the ICC, upon referral by the district court, determines that a carrier's billing practices were unreasonable and that to enforce the tariff requirement would be unlawful.

Maislin further argues that the ICC does not have the authority to change its policy concerning the filed rate doctrine as it can point to no specific statutory change in the Motor Carrier Act of 1980. We are not persuaded. In *American Trucking Ass'n, Inc. v. Atchison Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967), the Supreme Court stated:

the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * . Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

The ICC may therefore alter its past interpretation and we must accept that change if the new interpretation is reasonable. See *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is

entrusted to administer"). Here, the ICC evaluated the effects of the relaxed regulatory requirements in the Motor Carrier Act of 1980. It concluded that giving effect to negotiated rates, through its jurisdiction to enforce "reasonable practices" under section 10701, can avoid injustice without undermining the anti-discrimination goals of the filed rate doctrine. *Negotiated Rates*, 3 I.C.C.2d 99. The ICC further explained that in light of the regulatory changes "the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between the shippers." *Seaboard*, 794 F.2d at 638 (quoting *Buckeye*, 1 I.C.C.2d 767). We believe that the ICC decision represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act.

The district court adopted the factual findings of the ICC in determining that collection of the undercharges would be an unreasonable practice. The parties do not challenge the ICC's findings of fact. Maislin continually urges that the ICC's decision was no more than advisory, relying upon language in *Negotiated Rates*. See 3 I.C.C.2d at 107 (stating it was undertaking an "advisory analysis"). Viewed in context, the ICC simply recognized the allocation of responsibility between it and the courts, and that after it evaluates the reasonableness of a practice, the courts retain authority to structure a proper remedy. Maislin's semantic argument is not persuasive to us. See *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202, 205 (1960) (ICC decision finding rates unreasonable was "by no means a mere 'advisory opinion'").

III.

Maislin's argument that it is entitled to prejudgment interest computed from the dates of the shipments at issue need not be addressed, as we have affirmed the district

court's determination that Primary Steel is not liable for the amount of undercharges below the filed tariff rate.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 85-0021-CV-W-JWO

MAISLIN INDUSTRIES, U.S., INC., et al.,
Plaintiffs,

vs.

PRIMARY STEEL, INC.,
Defendant.

FILED

JUL 22 1988

R. F. CONNOR, Clk.
U. S. DISTRICT COURT
WEST DISTRICT
OF MISSOURI

MEMORANDUM AND ORDERS

I

A.

Plaintiffs filed the above-styled action on January 8, 1985 to collect \$187,923.26 in "undercharges" plus interest and costs, relating to 1,081 shipments of steel transported by defendant. On September 3, 1985 we entered orders granting defendant's motion to refer issues of controversy to the Interstate Commerce Commission (ICC) for determination and staying the above-styled action pending final determination by the ICC. See September 3, 1985 Order

at 5. On January 12, 1988 the ICC issued its final determination finding that it would be an "unreasonable practice now to require Primary to pay the undercharges." *Primary Steel, Inc. v. Maislin Industries, U.S., Inc.*, No. MC-C-10961, at 10 (ICC January 12, 1988). In so finding, the ICC expressly departed from its former policy which required the collection of undercharges, the difference between the published tariff and the amount charged at the time of shipment, no matter how unfair or unreasonable that might be in a given case.

On April 8, 1988 defendant Primary Steel "pursuant to the decision of the Interstate Commerce Commission in *Primary Steel, Inc. v. Maislin Industries, U.S., Et. Al.*, ICC docket No. MC-C-10961" filed a motion requesting the Court to enter summary judgment in its favor. Plaintiff Maislin Industries filed a cross-motion for summary judgment on May 11, 1988 contending that the ICC's above-noted decision constitutes an "advisory opinion, is not binding on the Court, is contrary to law and should not be adopted."¹

B.

When the ICC resolves a question within its primary jurisdiction the Commission's final determination should be accorded substantial deference and should not be set aside unless it exceeds the ICC's statutory authority or is unsupported by substantial evidence. See *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-21 (1966) ("By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their dis-

¹ In light of the ICC's January 12, 1988 decision and the pending cross-motions for summary judgment, we will enter an order lifting the stay in the above-styled case and direct the Clerk to place this case back on the active docket for the purpose of ruling the pending motions.

cretion for that of the agency."); *Erickson v. Transport Corp. v. I.C.C.*, 728 F.2d 1057, 1062-63 (8th Cir. 1984) ("the substantial evidence test is a narrow one and the reviewing court is not to substitute its conclusions for those of the Commission"); *Locust Cartage Co. v. Trans America Freight Lines, Inc.*, 430 F.2d 334, 341 (1st Cir. 1970). If the Commission departs from its former policy in resolving an issue within its primary jurisdiction, as in the instant case, it must adequately explain its change of policy in a manner sufficient to permit judicial review of the ICC's policies. See, e.g., *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635, 639 (11th Cir. 1986); *Intercity Transportation Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984). For the reasons we now state, we find that the ICC's January 12, 1988 decision should be affirmed and that summary judgment in favor of the defendant should be granted pursuant to Rule 56, Fed. R.Civ. P.

II

The Interstate Commerce Commission's findings of fact in the above-styled case are supported by the substantial evidence in the record as a whole.² Accordingly, the Commission's findings of fact as set forth in its January 12, 1988 order are incorporated herein by this reference as our findings of fact.

A.

Plaintiffs initially contend in their suggestions in support of their motion for summary judgment that "it is clear

² The record before the ICC is attached to defendant's motion for summary judgment as appendices 8-12. Neither party, for the most part, contests the ICC's findings of fact. Plaintiffs, however, do contest the ICC's finding that a negotiated rate existed as to all the shipments at issue. For the reasons we set forth in part II, C of this memorandum opinion, we find plaintiffs' contention is without merit.

... from the ICC decision that it neither addresses nor answers a question within its primary jurisdiction." Plts' Brief at 4. We disagree.

In the ICC's January 12, 1988 decision the Commission accurately stated that this Court "referred to the commission the question of the reasonableness of the rates sought to be collected by Maislin, and whether allowing their collection would be an unreasonable practice." ICC's Order at 1. Plaintiffs do not contest that the ICC has primary jurisdiction over the former question, but rather disputes its primary jurisdiction over the latter.

This Court's September 3, 1985 order definitively ruled on a rejected plaintiffs' primary jurisdiction contention. In our order we expressly found that, *inter alia*, the question of whether "plaintiffs' practice of assessing and rebilling the [defendant] higher freight rates and charges than those originally quoted by [plaintiffs], agreed upon by the parties, confirmed in writing and billed by the [plaintiffs] constitutes an unreasonable, unlawful, unfair, and deceptive practice in violation of 49 U.S.C. §§ 10701(a) and 10761" is a question within the primary jurisdiction of the ICC. Order at 2.

In so concluding, we stated that the doctrine of primary jurisdiction has been applied where action otherwise within the jurisdiction of the Court "turns on a determination of the reasonableness of a challenged practice. *Nader, supra*, 426 U.S. at 304-05." Order at 3. We thus found that the "doctrine requires the court to refer the matter to the ICC where 'the claim presented to the court requires an inquiry into the lawfulness of a carrier's practice.' *Iowa Beef Processors, supra*, 685 F.2d at 621." Order at 3.

We further noted that the ICC was investigating similar complaints and that "[s]uch a policy decision should be dealt with uniformly and with reference to the underlying reasons and policies for the regulations." *Id.* at 4. Thus we concluded that "it is appropriate that we defer to the

special expertise, competence, and administrative discretion possessed by the ICC." *Id.*

The Eighth Circuit has not addressed the application of the primary jurisdiction doctrine in a case, such as this, involving an allegation of unreasonable collection of undercharges. See *In re Total Transportation, Inc.*, 84 Bankr. 590, 596 (D. Minn. 1988) (noting the Eighth Circuit has not been presented with the precise question at issue). The Eleventh Circuit, however, has addressed the precise question we ruled on in our September 3, 1985 Order which plaintiffs again raise in their suggestions in support. *Seaboard Systems R.R. Inc. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986). The Eleventh Circuit, relying on *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), specifically found that "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the commission." *Id.* Thus, the *Seaboard* court concluded that the Commission's action of determining whether the collection of undercharges was an unreasonable practice under the circumstances of that case was both "justified and within its jurisdiction." *Id.* 637-639.

Subsequent to our September 3, 1985 order, a plethora of lower federal courts have also addressed the precise question presented by plaintiffs' initial contention. The majority of those courts have concurred with our finding in our September 3, 1985 Order.³ See, e.g., *RTC Transpor-*

³ This Court is fully cognizant of and has reviewed the decisions cited by plaintiffs which are in opposition to our September 3, 1985 order. See cases cited in plaintiffs' brief at 13 and Exhibit 1; see also cases cited in *In re Total*, 84 Bankr. at 595 n.3.

We, however, take a different view. A view supported by both the Eleventh Circuit and the majority of lower federal courts.

We further note that the United States Bankruptcy Court for the Eastern District of Michigan also referred the reasonableness of the rates sought to be collected by Maislin from 32 shippers similarly situated to defendant Primary Steel. On June 30, 1988 the ICC ruled

tation, Inc. v. Country Pride Foods, Ltd., No. CIV S86-1509-MLS/JFM, 1987 W.L. 46938 (E.D. Cal. 1987); *Motor Carrier Audit and Collection Co. v. Orval Kent Food Co.*, No. 87 C 5860, 1987 W.L. 19349 (N.D. Ill. 1987); *Delta Traffic Service Inc. v. Marine Lumber Co.*, 683 F. Supp. 754 (D. Colo. 1987); *In re Tucker Freight Lines Inc.*, 85 Bankr. 426 (W.D. Mich. 1988); *In re Amarex, Inc.*, 74 Bankr. 378 (Bankr. W.D. Okla. 1987); *Motor Carrier Audit & Collection Co. v. Family Dollar Stores*, 670 F. Supp. 644 (W.D.N.C. 1987); *Inf. Ltd. v. Spectro Alloys Corp.*, 651 F. Supp. 1405, 1407-08 (D. Minn. 1987). For additional cases see *In re Total*, 84 Bankr. at 594 n.2.

In light of our September 3, 1985 Order and the subsequent court decisions noted above supporting our ruling, we find and conclude plaintiffs' primary jurisdiction contention is untenable and must be rejected.

B.

Plaintiffs' correlative contentions in their suggestions in support may be summarized as follows: The ICC's "practices" jurisdiction does not empower the ICC to consider equitable defenses or authorize payment of charges below those contained in a published tariff; for such a policy would violate the proscription of 49 U.S.C. § 10761(a) and the long-standing "filed rate" doctrine. Plaintiffs' contentions are essentially the same as those contained in their briefs filed before the ICC. See Deft's Brief, Exh. 9. We find and conclude that the ICC's action in the above-styled case is sufficiently explained, justified, and within the limits of the commission's statutory authority under 49 U.S.C. §§ 10701(a), 10704(a)(1).

The Interstate Commerce Act, 49 U.S.C. § 10762(a)(1), requires all motor common carriers to publish and file

that it would be an unreasonable practice for such shippers to pay the filed rate rather than the rate negotiated by the parties. See ICC Decision No. MC-C-30013 (June 30, 1988).

tariffs containing their transportation rate with the ICC. The carrier is obligated to collect the rate published in its tariff (49 U.S.C. § 10761(a)) and failure to do so constitutes a criminal offense under 49 U.S.C. § 11903(a).

In the past, courts have not permitted deviation from the filed rate "upon any pretext." See, e.g., *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) ("Ignorance of misquotation is not an excuse for either paying or charging less or more than the rate filed."). The Commission historically has also refused to order the waiver of undercharges based on ignorance or carrier misquotations. See, e.g., *Rebel Motor Freight, Inc. v. Southern Beverage Co., Inc.*, 673 F. Supp. 785, 788 (M.D. La. 1987).

This rule of law is known as the "filed rate doctrine." Courts and the ICC have refused to digress from this harsh rule or to grant waiver of undercharges for fear that such a policy might lead to intentional "misquotations" by carriers seeking to discriminate in favor of particular shippers. See, e.g., *Motor Carrier Audit & Collection Co. v. Family Dollar Stores*, 670 F. Supp. 644, 645 (W.D.N.C. 1987) (citations omitted).

In 1986, the ICC announced a change in its policy regarding the strict enforcement of tariff rates. In light of the substantial deregulation of the common carrier industry accomplished by the Motor Carrier Act of 1980, the Commission determined that the rule prohibiting equitable defenses was no longer strictly applicable in cases where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged. See National Industrial Transportation League - Petition for the Institution on Negotiated Motor Common Carrier Rates, ex parte No. MC-177 (Oct. 29, 1986) (hereinafter *Negotiated Rates*). The ICC's new policy, as set forth in *Negotiated Rates*, is that upon a court's request, the Commission will determine, based on all the relevant circumstances, whether collection of undercharges would

constitute an unreasonable practice under 49 U.S.C. § 10704(a) and if a negotiated rate is found to exist, whether the negotiable rate is all the carrier should be permitted to collect.

The ICC appropriately emphasized in its decision in the above-styled case that "an inflexible approach to this issue frustrates the intent of the national transportation policy to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers and inhibit legitimate pricing initiatives. On the other hand, permitting equitable defenses in limited situations, we found, comports with the spirit of the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793 (1980)." ICC's Order at 5.

The ICC decision in this case, consistent with its policy statement in *Negotiated Rates*, identified the following two statutory provisions as its authority for considering all the circumstances underlying an undercharge suit and finding that the tariff filed by motor carriers need not and should not be applied: (1) 49 U.S.C.A. § 10701(a) which provides that "a practice . . . subject to the jurisdiction of the [ICC] . . . must be reasonable," and (2) *id* § 10704(a)(1) which authorizes the ICC to order a carrier to stop a violation.

This exercise of authority, as the ICC first emphasized in its policy statement and reiterated in its order, has been confirmed by the Eleventh Circuit in *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986). The court in *Seaboard* affirmed the ICC's determination in *Buckeye Cellulose Corp. v. L & N R.R. System R.R. Co.*, 1 I.C.C. 2d 767 (1985),⁴ that Sections 10701(a) and 10704(a) permit the ICC to consider a shipper's equitable defenses in a rail carrier's undercharge collection suit. *Id.* at 634. The *Seaboard* court agreed with the ICC that "changed circumstances" warranted re-examination of its previous

⁴ This Court cited *Buckeye* with approval in our September 3, 1985 Order.

policy of refusing to consider equitable defenses. 794 F.2d at 638. That case emphasized "[t]he Interstate Commerce Act, as amended, still embodies the policies of nondiscrimination and uniformity. The primary authority to give effect to those policies, though, is reposed in the ICC. Cf. *Nader*, 426 U.S. at 304, 96 S.Ct. at 1987." *Id.*

Nothing prohibits the ICC from changing its policy on enforcing the "unreasonable practice" provision of section 10701(a). *Id.* at 638. *Seaboard* also found the Commission's new policy "did not abolish the requirement of 49 U.S.C.A. § 10761(a) that carriers must charge the tariff rate. The statute does not say what remedy is available if less than the tariff rate has in fact been charged and paid for past shipments. That has been worked out by the Commission and judicial decision." *Id.*

The Eleventh Circuit in *Seaboard* thus concluded that the Commission had adequately set forth its basis for its change of position and that its change was justified and consistent with the ICC's statutory mission. *Id.* at 638-39.

The majority of lower federal courts have agreed with the Eleventh Circuit's decision in *Seaboard*. See, e.g., *In re Tucker Freight Lines, Inc.*, 85 Bankr. 426, 427-30 (W.D. Mich. 1988); *Motor Carrier Audit*, 670 F. Supp. at 647-650; *Younger Transportation v. TMBR Drilling, Inc.*, No. MO-85-CA-20 (W.D. Tex. 1987). For example, in *Younger Transportation v. TMBR Drilling, Inc.*, which involved facts similar to the case at hand, the Court held that the "ICC has jurisdiction and authority to consider the circumstances surrounding complainant's claim to the benefits of an allegedly negotiated rate." Slip. op. at 5. Thus the *Younger* court upheld the ICC's finding that "[i]t is not a reasonable practice for defendant *Younger* to collect the tariff base rate (rather than the negotiated rate) for the shipment described in this proceeding." *Id.*

We agree with the above-noted decisions and therefore find and conclude that the ICC's change in policy and

consideration of equitable defenses in the instant case was justified and consistent with its "practices" jurisdiction under the Interstate Commerce Act.

We further find and conclude that plaintiffs' reliance on *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), and *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), is untenable. For as the ICC accurately stated in its January 12, 1988 order those cases did not involve "the question of equitable defenses to a claim for undercharges." ICC's Order at 5. Moreover, those decisions did not hold that the Commission is precluded from passing on the reasonableness of carrier practices pursuant to its express authority in Section 10701(a). *Id.* For "the portions of *Square D*, *supra*, reaffirming that carriers must file their rates do not mean that [the Commission] lacks the authority to find, in an appropriate case, that allowing a carrier to collect the tariff rate would be unreasonable." *Id.*

Finally, we emphasize the ICC is "not abolishing the requirement in section 10761 that carriers must continue to charge the tariff rate. Rather, the ICC is simply exercising its authority to consider all the circumstances surrounding complainant's claim to the benefits of the allegedly negotiated rate in a case by case basis." *Id.*⁵

In light of our findings that the ICC's exercise of authority in the instant case was within its primary jurisdiction and consistent with the Interstate Commerce Act,

⁵ For the same reasons noted above, we find plaintiffs' reliance on the Eighth Circuit's decision in *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (1986), is untenable. Although the Eighth Circuit has acknowledged the ICC's change in policy in *Inman Freight Systems, Inc. v. Olin Corp.*, 807 F.2d 117 (8th Cir. 1986), it has not addressed whether this exercise of authority is consistent with the Interstate Commerce Act. In *Inman* the Court simply stated that "ICC's new policy does not apply directly to this case." *Id.* at 119.

we now turn to the issue of whether the Commission's decision is supported by substantial evidence.

C.

Defendant contends that the Commission's determination that the collection of the claimed undercharges by the plaintiffs "would result in an unreasonable practice pursuant to 49 U.S.C. § 10701(a) was supported by substantial evidence." brief at 22. We agree.

After an extensive review of all the facts and circumstances in this case in light of its experience and expertise, the ICC found the following: (1) plaintiffs over a continuing period of time offered defendant transportation at various quoted rates which defendant accepted; (2) defendant reasonably relied on plaintiffs to implement properly the quoted rate; (3) plaintiffs' failure to do so, despite defendant's lack of diligence, should under the circumstances, preclude plaintiffs later collection of undercharges; (4) there is absolutely no evidence that defendant agreed to pay any more than the amount plaintiffs originally quoted and billed for each shipment; (5) there is absolutely no evidence that plaintiffs even demanded additional amounts over the amounts they billed at any time during the business relationship with defendant; and (6) defendant reasonably believed that the amounts quoted and billed by plaintiffs were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between the parties and thus, since full payment was made by defendant, plaintiffs are equitably entitled to collect no more. ICC's Order at 9-10.

Our view of the record before the ICC establishes the above findings are supported by substantial evidence. We therefore reject plaintiffs' contention that the "commission's conclusion as to the existence of a negotiated rate on all shipments is not supported by substantial evidence."

To support this position, plaintiffs argue, as they did before the ICC, that numerous discrepancies exist between the negotiated or quoted rates and those actually charged by plaintiffs. We, however, agree with the ICC's finding that such discrepancies are insignificant.⁶ In light of the evidence accurately set forth in the ICC's decision, plaintiffs' contention must be rejected. See ICC's Order at 7-8.

In sum, we find and conclude that the Commission's determination that a negotiated rate existed and that the collection of the alleged undercharges would be an unreasonable and unlawful practice is supported by substantial evidence and thus should be affirmed. We therefore grant summary judgment in favor of defendant.

Accordingly, it is

ORDERED (1) that the stay in the above-styled case should be and the same is hereby lifted and the Clerk is directed to place the case back on the active docket. It is further

ORDERED (2) that plaintiffs' motion for summary judgment should be and the same is hereby denied. It is further

ORDERED (3) that defendant's motion for summary judgment should be and the same is hereby granted. It is further

⁶ The ICC accurately stated that "of the 400 shipments identified by Maislin, 177 show a plus or minus 1-cent difference between the rate billed and rate on the rate sheets, and another 77 show a plus or minus 2-cent difference, for a total of 254. Of the remaining 146 shipments, 76 show a difference of plus or minus 5 cents or less. The remaining shipments vary by as much as 30 cents above or below the rate sheet figures." ICC's Order at 7.

ORDERED (4) that the Clerk is directed to enter judgment in favor of the defendant and against the plaintiff on a separate document in accordance with Rule 58 of the Federal Rules of Civil Procedure.

/s/ John W. Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri
July 22, 1988

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

CASE NUMBER: 85-0021-CV-W-JWO

MAISLIN INDUSTRIES, U.S., INC., et al.

V.

PRIMARY STEEL, INC.

FILED

JUL 22 1988

R. F. CONNOR, Clk.
U. S. DISTRICT COURT
WEST DISTRICT
OF MISSOURI

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The plaintiff's motion for summary judgment should be and the same is hereby denied.

The defendant's motion for summary judgment should be and the same is hereby granted.

Entered On 7/25/88

July 22, 1988
Date

R.F. Connor
Clerk

/s/ Mark Dover
(By) Deputy Clerk

APPENDIX C

EC

INTERSTATE COMMERCE COMMISSION

No. MC-C-10961

PRIMARY STEEL, INC.

v.

MAISLIN INDUSTRIES, U.S., INC., ET AL.¹

Decided: January 12, 1988

SERVICE DATE

JAN 19 1988

By complaint filed March 22, 1985, Primary Steel, Inc. (Primary or complainant) seeks a determination that it would be an unreasonable practice in violation of 49 U.S.C. 10701(a) to allow Maislin Industries, U.S., Inc. (Maislin or defendant) to collect more than the rates it allegedly quoted on 1,081 shipments of steel transported generally from Primary's Connecticut supply points to points in 12 States. Defendant filed a reply and complainant filed rebuttal.

The complaint² raises issues of negotiated rates addressed in *NITL-Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99 (1986) (*Negotiated Rates*). It arises from a proceeding in the United States District Court for the Western District of Missouri (Western Division) in which defendant, through its court-appointed agent, Carrier Credit and Collection, Inc. (CCC) seeks to collect under-

¹ Gateway Transportation Co., Inc., Quinn Freight Lines, Inc., Richmond Cartage Corp., and Maislin Transport of Delaware, Inc. These companies are all affiliated with Maislin Industries, U.S., Inc.

charges from complainant in the amount of \$187,923.36.² The court referred to the Commission the question of the reasonableness of the rates sought to be collected by Maislin, and whether allowing their collection would be an unreasonable practice.

PRELIMINARY MATTERS

Maislin filed a motion requesting that the Commission accept its Statement of Facts and Argument (in effect its reply to complainant's opening statement) one day late. (The statement was due March 26, 1987, and was received March 30, 1987.) Maislin states that it advised counsel for Primary of this request and that he had no objection. Although more than one day late, we will grant the motion and accept defendant's pleading. No prejudice will result to any party.

Maislin also moves to strike certain portions of complainant's rebuttal statement because they contain misstatements of fact and arguments based on those misstatements. Primary has replied. We will deny the motion. Maislin's objections go more to the weight to be accorded these statements than to their admissibility.

BACKGROUND

Primary is a distributor of steel products such as structural steel, plate steel, pipe steel, and beams. It distributes these products, as pertinent, from a warehouse at North Haven, CT, to customers in the northeastern and mid-atlantic States. It receives steel from various manufactur-

² Civil Action No. 85-0021-CV-W-1, *Maislin Industries, U.S., Inc., et al. v. Primary Steel, Inc.*

ers, often at the piers at Bridgeport and New Haven, CT. Sometimes it ships from these piers directly to customers.³

The undercharge claims relate to 1,081 shipments of steel products over a 3-year period beginning in January 1981 and ending (with two exceptions) in November 1983. Of these, 1,073 were outbound truckload movements from complainant's Connecticut facilities, primarily the North Haven facility, to 157 destinations in 12 States.⁴ Approximately 70 of these outbound shipments originated at Bridgeport, and some were consigned from New Haven. Eight of the 1,081 shipments were inbound movements to North Haven. All shipments were transported by Quinn Freight Lines, Inc. (Quinn) pursuant to various rates allegedly negotiated but not published or filed.⁵ CCC now seeks to collect \$187,923.26 in undercharges, plus interest and costs, based on the lowest applicable published and effective tariff rates on file with the Commission on the date of each shipment.

According to Primary, Joseph Costello, manager of Primary's North Haven warehouse, negotiated rates for the involved shipments with Quinn. Sometime in 1979, Frank Kravontka, identified only as a Quinn representative, visited Mr. Costello and solicited Primary's steel traffic. Mr. Costello told Mr. Kravontka that Primary would consider

³ Verified statements on behalf of Primary were submitted by Murray Relis, vice-president of Primary, Joseph Costello, manager of its North Haven warehouse, James McGowan, Jr., formerly employed by Quinn Freight Lines' local agent, and David W. Donley, a principal with a transportation management and research firm.

⁴ Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Pennsylvania, Virginia, and North Carolina.

⁵ Although the parties use the terms "Quinn," "Quinn/Maislin," and "Maislin" interchangeably when referring to the actual carrier that transported the shipments, the preponderance of the evidence leads us to conclude that Quinn was the only carrier involved.

using Quinn if its rates were comparable to those of P&NE Trucking Co.⁶ Allegedly, Mr. Kravontka later called him to advise that Quinn would meet those rate levels, and based on that representation, Primary began tendering traffic to Quinn in late 1979.

In early 1980, James McGowan, Jr. became Quinn's principal contact for Primary. Mr. McGowan worked for Joe Brennan, Quinn's local agent. His job was to obtain "special commodities" traffic for Quinn. In 1981, Mr. McGowan ostensibly negotiated a 5 percent across-the-board increase with Mr. Costello that was cleared by Bud Pardus, Quinn's director of rates at its Adamsburg, PA, headquarters. A 3-page handwritten rate sheet prepared by Primary from rate quotes supplied by Mr. McGowan was submitted in evidence. It is dated June 23, 1982, and contains over 130 points and nearly as many rates.

In late 1981, Maislin took over Quinn, but there was no real change for Mr. McGowan in operating procedures. He continued to call Mr. Pardus on all rate matters. Sometime in 1982, Mr. Costello allegedly told Mr. McGowan that Primary needed rate relief if Primary were to continue to use Quinn. According to Primary, Mr. McGowan called Mr. Pardus and told him that he wanted to cut Primary's rates by 2 cents per hundredweight and also reduce some stop-off charges. Mr. Pardus gave his approval. Mr. McGowan then agreed on an effective date for these new rates with Mr. Costello that was about 30 days later. He prepared a new rate sheet and sent copies to Mr. Costello, Mr. Pardus, and to James Stradley, Quinn's

⁶ Mr. Costello states that, although he did not have tariffs on hand, he kept abreast of the rates charged by Primary's motor carriers by a notebook containing rate sheets that his office staff prepared from rates offered Primary to various destinations. Whenever a carrier solicited freight, Mr. Costello referred to this notebook to advise it of the going rate level the carrier had to match to be considered. Carriers' freight bills were also checked against these rate sheets by office staff.

regional manager. A copy was submitted in evidence. This rate sheet is typewritten, three pages in length, and contains various rates for about 140 destinations. The letterhead contains the address of Quinn's special commodities division at Adamsburg. The top of the first page contains this statement: "Rates and charges agreed upon with Joe Costello, Primary Steel North Haven, Conn. effective 8/9/82." On the last page, it is noted: "In compliance with your wishes the above rates represent a 2ct. cwt reduction and the Stop-off Charges will be reduced 5%. . . ." It is signed "Jim."

Subsequently, Primary states, when rates were needed for points other than those shown on the rate sheet, Mr. Costello or someone in his office contacted Mr. McGowan. Mr. McGowan then checked the mileage involved, set a new rate level based on the existing rate sheet, and cleared the rate with Mr. Pardus. He then notified Primary. Mr. Costello stated that he understood that Mr. McGowan got approval for all new rates from Adamsburg. The copy of the second rate sheet submitted by Primary contained more than 50 rates and points subsequently written in by hand by Primary personnel. The rates shown on the second rate sheet were in use from their effective date until Quinn's bankruptcy.

Mr. McGowan states that he considered all rates which he quoted Primary to be "protected rates," which he defines as rates that he had agreed on with the shipper and which had been approved by Quinn's top management. Mr. McGowan states that every arrangement on rates with Primary was done with the prior approval of Quinn's home office. Mr. Costello states that Quinn never sent him an actual tariff, that he had no training in tariffs, and that he relied solely on the rate sheets to check rates. However, he understood that Quinn would do whatever was necessary to implement the agreed upon rates.⁷ Quinn, for the

⁷ During the time period involved here, the negotiated but unfilled

most part (*see* discussion *infra*), billed Primary at these rates, and Primary paid the bills without incident.

DISCUSSION AND CONCLUSIONS

This proceeding involves regulated interstate shipments for which the rates originally charged were less than the lawful tariff rates on file with the Commission. Common carriers subject to the jurisdiction of the Commission must publish and file with the Commission tariffs setting out the rates and charges for their services, and generally may not charge or receive compensation different from that specified in those tariffs. 49 U.S.C. 10761 and 10762. However, Primary asserts that in this instance the tariffs applied to the involved shipments by CCC should not be used, and that rates were negotiated with Quinn and paid. Conversely, Maislin urges that the tariffs cited by CCC are applicable to complainant's shipments, and that the cited tariff rates are reasonable. It relies primarily on the argument that the Commission has no authority to advise or authorize payment of charges below those contained in a published tariff. As this is a jurisdictional argument, we will address it first, with reference to our policy statement in *Negotiated Rates* and relevant court decisions. We will then determine whether or not tariff rates are applicable to the involved shipments or whether negotiated rates existed. Finally, we will analyze the facts consistent with our *Negotiated Rates* policy to determine the amount of payment defendant equitably should be allowed to collect.

1. *Negotiated rates versus filed rates in general.* Maislin argues that the filed rate doctrine and 49 U.S.C. 10761(a)

rate issue had yet to arise and come before us. Filed tariffs were required and a shipper's ignorance of that requirement was no excuse for not applying them. *See* discussion *infra*. Nothing in the record indicates that Primary knew when it used Quinn's service that tariffs were not yet filed or effective. Thus while Mr. McGowan considered the rates to be "protected," under his definition, no illegal rebating issues appear to be involved here.

bar equitable defenses to the collection of undercharges. It maintains that, while the Commission has prospective and retrospective remedial power over unreasonable rates, its authority over practices is prospective only. It asserts that, under section 10704(b)(1), if the Commission decides that a motor carrier's practice is unlawful, it can only prescribe future conduct; it cannot retroactively nullify filed rates on the basis of unreasonable past practice. Thus, defendant concludes that complainant's equitable claims are invalid as a matter of law, and that the Commission is without authority to declare collection of the tariff rates unlawful or to declare the negotiated rates applicable to the involved traffic.

In the past, ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rate. See, e.g., *Louisville & Nashville v. Maxwell*, 237 U.S. 94, 97 (1915); and *A.J. Pool v. Chicago B.I.O.*, 12 I.C.C. 418 (1907). However, we noted in No. MC-C-30025, *Manufacturers Consolidation Service, Inc. - Petition for Declaratory Order* (not printed), served November 27, 1987, one of our most recent decisions under *Negotiated Rates*, that recent Commission decisions have reexamined this issue. In *Buckeye Cellulose Corp. v. L&N R.R. Co.*, 1 I.C.C.2d 767 (1985) (*Buckeye*), *aff'd sub nom. Seaboard System R.R. Co., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986) (*Seaboard*), we recognized the shipper's equitable defenses in a tariff applicability case involving a rail carrier. We explained there that our prior practice of generally refusing to order the waiver of undercharges based on carrier rate misquotations resulted from concern that granting such relief might have led to intentional "misquotations" by other carriers seeking to discriminate in favor of particular shippers. In *Buckeye*, however, we concluded that penalizing a shipper for the mistakes of a carrier may be unnecessary to deter discrimination in today's more flexible pricing atmosphere. Our determination was affirmed in *Seaboard*.

Subsequently, in *Negotiated Rates* we took a fresh look at the proper regulatory response to the matter of unfiled negotiated motor carrier rates. We explained that an inflexible approach to this issue frustrates the intent of the national transportation policy to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers and inhibit legitimate pricing initiatives. On the other hand, permitting equitable defenses in limited situations, we found, comports with the spirit of the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793 (1980).

Defendant's assertion that the charges contained in an applicable tariff must be assessed regardless of the circumstances is, in our opinion, no longer valid. The decisions in *Seaboard*, *Negotiated Rates*, and *Buckeye* confirm that sections 10701(a) and 10704 give us the authority to consider all the circumstances surrounding an undercharge suit. Although section 10761 requires that carriers must charge the tariff rate, "the statute does not say what remedy is available if less than the tariff rate has in fact been charged and paid for past shipments." *Seaboard*, *supra* at 638.

We have considered and discussed these jurisdictional arguments at length in a number of recent decisions, including *Wakefern Food Corp. v. Southwest Frgt. Lines, Inc.*, 3 I.C.C.2d 814 (1987). In that case, we held invalid assertions that the charges contained in an applicable tariff must be assessed regardless of the circumstances. We concluded that the decisions in *Negotiated Rates* and *Buckeye* confirm that sections 10701(a) and 10704 give us the authority to consider all the circumstances surrounding an undercharge suit. We adopt the reasoning of those cases here.

In sum, our jurisdiction over unreasonable practices gives us discretion to find that the tariff rate filed by motor carriers need not and should not be applied in a particular case. As we explained in *Negotiated Rates*, neither *Square*

D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. —, 90 L.Ed.2d 413, 106 S.Ct. 1922 (1986), nor *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), involved the question of equitable defenses to a claim for undercharges. Nor do those decisions indicate that the Commission is precluded from passing on the reasonableness of carrier practices pursuant to its express authority in section 10701(a). We are not abolishing the requirement in section 10761 that carriers must continue to charge the tariff rate. Rather, the issue is simply whether we have the authority to consider all the circumstances surrounding complainant's claim to the benefits of the allegedly negotiated rate. The portions of *Square D*, *supra*, reaffirming that carriers must file their rates do not mean that we lack the authority to find, in an appropriate case, that allowing a carrier to collect the tariff rate would be unreasonable.

Our role in such cases is to undertake an analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts, and to determine: (a) whether collection of undercharges based on the rate contained in the published tariff would constitute an unreasonable practice and; (b) if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect. *Negotiated Rates*, *supra*.

2. *The existence of negotiated rates.* It is clear that negotiations took place between Primary, represented either by Mr. Costello or by another person on his staff, and Quinn, represented by Mr. McGowan, prior to movement of the shipments in question. Further, there is evidence of offers, acceptances, and approvals by the involved parties.

While the record is not clear whether Mr. Kravontka was a Quinn employee or local agent, or whether any of the rates negotiated by him in 1979 were still in effect in

1981 and applied to any of the involved shipments, it does show that Mr. McGowan replaced Mr. Kravontka as Primary's contact at Quinn in 1980. It also reveals that the first negotiations by Mr. McGowan and Mr. Costello occurred sometime in 1981 when a 5 percent across-the-board rate increase took place. Since the first shipment involved here moved in January 1981, it is possible that some of the involved 1981 shipments moved prior to the 5 percent increase and at the rates negotiated by Mr. Kravontka.

However, the preponderance of evidence leads us to conclude otherwise. David W. Donley, a transportation consultant, submitted a statement and exhibit on behalf of Primary in which he compared the rate levels contained on the two rate sheets to the rate levels originally assessed by Quinn and paid by Primary on each of the 1,081 shipments. His comparison shows that the rate sheet rate levels, with some exceptions to be discussed later, were in fact applied by the carrier.* During the first 5 months of the year, only five shipments moved—on January 31, February 21, February 24, April 8, and April 14. The rate levels on these shipments matched those on the rate sheet or differed by a penny or two. The rate levels on the remaining 1981 shipments (nearly 500) matched in a similar way. Significant differences, then, do not exist, and we conclude that the rates applied to the 1981 shipments were those negotiated by Mr. McGowan. In addition, we note that defendant apparently does not dispute this because it does not address any of its comments or argument specifically to its dealings with Mr. Kravontka or to the applicability of the rates he negotiated.

As noted, the specific rates negotiated are evidenced by the two rate sheets dated June 23, 1982, and August 9,

* Mr. Donley states that the rates on the first rate sheet include a fuel surcharge mandated by the Commission on April 23, 1982. To determine the specific rates used prior to April 23, Mr. Donley deducted 18 percent from each rate on the rate sheet.

1982. Those sheets collectively list more than 150 destinations with individual rates from either Bridgeport or North Haven or both. The rates range generally from about 54 cents to \$1.59 per hundredweight. The second rate sheet, prepared for the most part by Mr. McGowan, is, on its face, applicable only to traffic moving after August 9, 1982. We conclude that this presents valid evidence of the actual rates negotiated for the movement of shipments from that date onward. Furthermore, it contains numerous new rates for new points written by Mr. Costello's office staff after Primary received the initial typed copy. We find this evidence probative of the existence of negotiated rates.

The record shows that a uniform procedure was followed whenever the need for a new point-to-point rate arose. Mr. Costello or a member of his staff called Mr. McGowan, who then checked the mileage involved and arrived at a rate based on similar existing rates. He always called Adamsburg for approval, and then advised Primary of the approved rate. This rate was then entered on the rate sheet, and Quinn began to move the traffic. In these circumstances, we conclude the second rate sheet establishes the specific rates negotiated for the movement of traffic after August 9, 1982.

We are less comfortable with the first rate sheet than with the second because it is dated a considerable time after the shipments began to move. However, despite the fact that it is dated June 23, 1982, we conclude that it establishes the specific rates negotiated for the movement of traffic beginning in January 1981 and ending at the time the second rate sheet took effect. We reach this conclusion because the record is clear that negotiations took place: the rates on this rate sheet are confirmed by those on the second which used them as a base; and the evidence shows that, with a few exceptions, the rates billed by Quinn prior to August 9, 1982, were in fact those contained on the first rate sheet.

3. *Billing discrepancies.* In support of its position that negotiated rates did not exist, defendant argues that numerous discrepancies exist between the rates shown on the two rate sheets and those actually charged by Quinn. It states that an examination of Mr. Donley's exhibit shows that on 400 of the 1,081 shipments the billed rate differed from the rate sheet rate. Defendant argues that the number of these discrepancies cannot be rationalized as isolated aberrations, and undermines complainant's assertion that it relied on the rates shown on the rate sheets. Maislin concludes that Primary should not now be permitted to claim any benefits from rates which it evidently did not consider itself bound to at the time.

We are unpersuaded by defendant's arguments because most of the differences are insignificant. While we cannot explain every discrepancy, our review of Mr. Donley's exhibit with respect to the 1,081 shipments involving more than 150 points under the two sets of rates reveals the following. Of the 400 shipments identified by Maislin, 177 show a plus or minus 1-cent difference between the rate billed and rate on the rate sheets, and another 77 show a plus or minus 2-cent difference, for a total of 254. Of the remaining 146 shipments, 76 show a difference of plus or minus 5 cents or less. The remaining shipments vary by as much as 30 cents above or below the rate sheet figures. Further analysis reveals that approximately 150 of the 400 shipments were billed by Quinn at a rate higher than the rate sheet rate (of these, 57 were at a rate 1 cent higher, and 20 were at a rate 2 cents higher), and about 250 of the 400 shipments were billed by Quinn at a rate lower than the rate sheet rate.

The evidence suggests that some of the 1-cent differences can be attributed to the method of fuel surcharge fold-in. Apparently, for purposes of rate quotation, a simple 1-step fold-in process was used that involved rounding the resultant figure to the nearest penny only once, but for purposes of billed rates, a 2-step process was used that

involved two roundings to the nearest penny. This accounts for some of the few cent differences. Further, Mr. Costello testified that differences of a penny would not have raised any concerns at Primary, and we find differences of 2 cents not significant either considering the large number of shipments and individual rates at issue here. As to the 73 shipments that Quinn billed Primary at rates more than 2 cents over the rate sheet rates, we conclude they are not significant when compared to the total number of shipments over the 3-year period. The majority of the 1,081 shipments show no discrepancy whatsoever between the billed and rate sheet rates, and the majority of the remaining shipments show no significant discrepancy. It is likely that laxity on the parts of both carrier and shipper was to blame for any differences, and that Quinn apparently misbilled and Primary apparently either failed to detect the misbillings or concluded they did not merit the cost of pursuing overcharge claims. Accordingly, this does not change our conclusion that negotiated rates existed for the 1,081 shipments and that these rates were reflected on the two rate sheets.

4. *Was there a reasonable basis for shipper to rely on representations made?* The evidence of record shows that Mr. McGowan negotiated on behalf of Quinn and offered Primary rates that were approved in each instance by Mr. Pardus, Quinn's director of rates. Primary's Mr. Costello understood that all rates offered to Primary were approved by Quinn's Adamsburg office. Further, a written rate sheet that confirmed these rates was given to Primary. In these circumstances, we conclude that Primary could legitimately rely on representations made by a carrier's local agent and approved by the carrier's director of rates. Clearly, the quoted rates were established by individuals whose positions and actions reasonably induced the shipper's reliance on the arrangement.⁹

⁹ The fact that Mr. McGowan was actually an employee of Quinn's

Finally, we note that Maislin's use of local, commissioned agents to obtain traffic was apparently a widespread practice. In other similar proceedings before the Commission involving Maislin, over 40 shippers, and many thousands of shipments,¹⁰ the evidence shows that it was Maislin's practice to use local agents to solicit traffic for the Maislin carriers and negotiate rates, subject to approval from Maislin management.

5. *Application of the Negotiated Rates policy.* *Negotiated Rates* was intended to temper the harsh effects of the filed rate doctrine when it could be shown that the shipper and carrier negotiated and agreed on a rate that was not published in a tariff. Such a showing has elements of contract law, e.g., offer, acceptance, reliance, etc. In *Buckeye*, we discussed the shipper's good faith reliance on a carrier's long-term rate misquotation, and concluded that the shipper should not later be penalized for, in those circumstances, reasonable reliance on the carrier's representation. In that case, there was: (1) evidence showing a long period of misquotation; and (2) direct testimony of oral and written communications with the carrier during which the misquote was confirmed.

Primary alleges that defendant engaged in a pattern of deceitful business practices from which it should not benefit. The evidence, however, does not disclose a pattern

local agent, Mr. Brennan, does not affect this conclusion. For all practical purposes, in his negotiations with Primary Mr. McGowan became the actual agent. In any event, by billing Quinn at the quoted rates, Quinn thereby accepted them.

¹⁰ We take official notice of the proceedings in No. MC-C-10983, *Fort Howard Paper Company v. Maislin Industries, U.S., Inc., et al.* (not printed), served August 12, 1987, as corrected by notice to the parties served August 28, 1987; No. MC-C-30013, *A.J. Hollander Company, et al. - Petition for Declaratory Order* (pending); No. MC-C-30007, *Auto Specialties Manufacturing Co., et al. - Petition for Declaratory Order* (pending); and No. MC-C-30030, *Packerland Packing Company, Inc. v. Maislin Industries, U.S., Inc., et al.* (pending.)

of continuing deceit. Quinn's employees or agents regularly quoted Primary rates on steel traffic from 1979 through 1983. Following negotiations, the quoted rates were accepted by Primary and approved by Quinn's supervisory personnel. Traffic then moved at these rates, Primary was billed at them, and it paid all charges in full. The most that can be said in this regard is that Quinn actively negotiated to obtain Primary's business and that it lowered its rates to meet the competition from at least one other carrier. While Quinn may not have taken appropriate steps to legalize the quoted rates, it has not been demonstrated that this occurred as a result of any intent to engage in unlawful conduct. What emerges from a review of this record is that Quinn attempted to obtain, in a vigorous competitive manner, Primary's traffic. It then failed to provide (for unknown reasons) for the publishing and filing of those rates.

For its part, Maislin faults Primary for failing to discover that the billed rates did not conform to effective governing tariff rates, and it argues that this failure precludes Primary from escaping responsibility for the undercharges. Maislin contends that Primary had ready access to any tariff it desired to examine. It could have demanded a copy from the carrier or obtained a copy from the Commission or from any number of tariff watching services. Instead, Primary chose to do business on the strength of telephone conversations. That business judgment, it argues, does not warrant relief from the payment of lawful tariff charges.

We have addressed this argument before. In *Fort Howard*, *supra* at note 10, the shipper not only subscribed to tariff services but also had copies of Maislin's actual tariffs on hand. Nevertheless, we found that this did not negate the existence of a negotiated rate, nor did it preclude us from applying in that situation the policy announced in *Negotiated Rates*. Slip op. at 5. Additionally, in No. MC-C-30032, *Mitchell Milling Co., Inc. - Petition for Decla-*

ratory Order (not printed), served October 22, 1987, we found not necessarily controlling the fact that the shipper admitted to an ignorance of tariff filing requirements, although we decided it would be considered in weighing the equities. Slip op. at 3. We see no reason to depart from the reasoning of these cases here.

The evidence, then, discloses that, over a continuing period of time, Quinn offered Primary transportation at the involved rates and that Primary accepted those offers. Primary relied on Quinn to implement properly the quoted rates. Quinn's failure to do so, despite Primary's lack of vigilance, should, in these circumstances, preclude Quinn's later collection of undercharges. There is absolutely no evidence that complainant agreed to pay any more than the amount defendant originally quoted and billed for each shipment. There is no evidence that Quinn ever demanded additional amounts over the amounts it billed at any time during its business relationship with Primary. We find that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Primary and Quinn, and that, since full payment was made by complainant, defendant is equitably entitled to collect no more.

SUMMARY

A decision in favor of the shipper under the *Negotiated Rates* precedent requires two basic findings: (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom the shipper legitimately could rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the rate quotation.

In this case, the evidence shows that Quinn's local agent, Mr. McGowan, quoted Primary a series of rates over a

continuing period of time, and that Quinn's director of rates approved these rates. Primary, moreover, reasonably relied on Mr. McGowan and his quotations in view of the fact that it was told the quotations were approved by top management and it received a written rate sheet reflecting the agreed to rates. In light of our conclusion that negotiated rates existed, we find that it would be an unreasonable practice now to require Primary to pay undercharges for the difference between the negotiated rates and the tariff rates.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Maislin's motion to file its Statement of Facts and Argument late is granted.
2. Maislin's motion to strike is denied.
3. This proceeding is discontinued.
4. A copy of this decision will be mailed to the United States District Court for the Western District of Missouri (Western Division).

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX D

**APPELLATE PROCEEDINGS INVOLVING
NEGOTIATED RATES ISSUE**

<u>U.S. Court of Appeals</u>	<u>Case and History</u>	<u>Status</u>
First Circuit	No. 89-1662, <i>Delta Traffic Service, Inc., et al. v. Transtop Incorporation</i> . On appeal from decision of U. S. District Court for the District of Massachusetts denying referral and granting judgment for recovery of tariff charges.	Pending
Second Circuit	No. 88-9057, <i>Delta Traffic Service, Inc., et al. v. Appco Paper & Plastics Corp.</i> On appeal from decision of U.S. District Court for Eastern District of New York denying referral and granting judgment for recovery of tariff charges.	Pending (argued August 17, 1989)
Third Circuit	No. 89-1130, <i>Branch Motor Express Company v. Caloric Corporation</i> . On appeal from decision of U. S. District Court for Eastern District of Pennsylvania rejecting ICC opinion and granting judgment for recovery of tariff charges.	Pending (argued June 27, 1989)

<u>U.S. Court of Appeals</u>	<u>Case and History</u>	<u>Status</u>
Fourth Circuit	No. 89-3259, <i>Langdon M. Cooper, Trustee and Mark & Assoc. of North Carolina, Inc. v. Delaware Valley Shippers Assoc., Inc.</i> On appeal from decision of U. S. District Court for Western District of North Carolina adopting ICC opinion and denying recovery of tariff charges.	Pending
Fifth Circuit	No. 88-1209, <i>Matter of Caravan Refrigerated Cargo, Inc.</i> Appeal decision of U. S. District Court for Northern District of Texas denying referral and granting judgment for recovery of tariff charges.	Decided February 2, 1989. Pending on petition for writ of certiorari in No. 88-1958.
Sixth Circuit	Nos. 89-5108, 89-5110, <i>James B. Orr and Highway Express, Inc. v. Sewell Plastics, Inc.</i> On appeal from decision of U. S. District Court for Western District of Tennessee adopting ICC opinion and denying recovery of tariff charges.	Pending

<u>U.S. Court of Appeals</u>	<u>Case and History</u>	<u>Status</u>
Seventh Circuit	Nos. 89-1329, 89-1330, <i>Orscheln Bros. Truck Lines, Inc. v. Zenith Electric Corporation.</i> On appeal from decisions of the U. S. District Court for the Northern District of Illinois.	Pending
Eighth Circuit	No. 88-2267, <i>Maislin Industries, U.S., Inc. v. Primary Steel, Inc.</i> Appeal from decision of U. S. District Court for Western District of Missouri adopting ICC opinion and denying recovery of tariff charges.	Decided July 17, 1989, affirming district court. Pending on Petition for Writ of Certiorari

U.S. Court of
Appeals

Case and History

Status

Ninth Circuit

No. 88-5324, *INF, Ltd. v. Spectro Alloys Corp.* Decided August 3, 1989, reversing district court. Petition for Writ of Certiorari to be filed.

No. 89-35115, *Delta Traffic service, Inc. v. Weyerhaeuser Co.* On appeal from decisions of U. S. District Court for District of Oregon adopting ICC opinions and denying recovery of tariff charges. Pending (Argued October 3, 1989)

Eleventh Circuit

No. 89-8450, *Feldspar Trucking Co. v. Greater Atlanta Shippers.* On appeal from decision of U. S. District Court for Northern District of Georgia granting judgment for recovery of tariff charges. Pending

APPENDIX E

REPORTED FEDERAL COURT DECISIONS
REFERRING NEGOTIATED RATES ISSUE TO ICC

- District of Columbia - Maislin Transport v. House of Wines*, 1987 Fed.Car. Cas. Para. 83,316 (D.D.C. 1987)¹
- Georgia - Delta Traffic Service, Inc. v. Knight-Ridder Newspaper Sales, Inc.*, 691 F.Supp. 339 (N.D.Ga. 1988)
- Illinois - Tobler Transfer v Caterpillar*, 74 B.R. 373 (Bankr. Ct., C.D.Ill. 1987)
- Michigan - Tucker Freight Lines v. United Exposition*, 85 Bankr. 426 (W.D.Mich. 1988); affirmed affirmed 1988 Fed.Car.Cas. Para. 83,400)
- Minnesota - INF, Ltd. v. Spectro Alloys Corp.*, 651 F.Supp. 1405 (D.Minn. 1987)
- North Carolina - Motor Carrier Audit & Collections v. Family Dollar Stores*, 670 F.Supp. 644 (W.D.N.C. 1987)
- Oklahoma - In re: Amarex, Inc.*, 74 Bankr. 378 (Bkr. Ct.W.D. Okla. 1987)
- Oregon - Delta Traffic Services v. Marine Lumber Co.*, 683 F.Supp. 754 (D.Ore. 1987)
- Pennsylvania - Breman's Express Company v. H & H Distributing Co., et al.*, 1987 Fed.Car.Cas. Para. 83,299 (Bankr. Ct. W.D.Pa. 1987)
- Wisconsin - G.M.W., Inc. v. Flambeau Paper Corp.*, 623 F.Supp. 423 (W.D.Wisc. 1985)

¹ Citation refers to Federal Carriers Cases reported and published by Commerce Clearing House, Inc.

APPENDIX F

REPORTED FEDERAL COURT DECISIONS DENYING
REFERRAL OF NEGOTIATED RATES ISSUE TO ICC

- California* - *West Coast Truck Lines v. Kaiser Aluminum & Chemical*, 1987 Fed.Car.Cas. Para. 83,336 (N.D. Cal. 1987)
- Colorado* - *Motor Carrier Audit & Collection v. United Food Service*, 1987 Fed.Car.Cas. Para. 83,326 (D.Colo. 1987)
- Connecticut* - *Delta Traffic Services v. Georgia Pacific Corp.*, 684 F.Supp. 769 (D.Conn. 1987)
- Georgia* - *Feldspar Trucking Co. v. Greater Atlanta Shippers Ass'n.*, 683 F.Supp. 1375 (N.D.Ga. 1987)
- Louisiana* - *Rebel Motor Freight, Inc. v. Southern Beverage Co., Inc.*, 673 F.Supp. 785 (M.D.La. 1987)
- Minnesota* - *Total Transportation, Inc. v. Armour & Co.*, 1988 Fed.Car.Cas. Para. 83,369 (D.Minn., 4th Div. 1988)
- Missouri* - *Campbell Sixty Six Express v. H.A. Cole Products Company*, 1989 Fed.Car.Cas. Para. 83,469 (Bkrtcy Ct., W.D.Mo. 1988)
- New Jersey* - *Oneida Motor Freight, Inc. v. Felsway Corp.*, 1988 Fed.Car.Cas. Para. 83,346 (Bkrtcy. Ct., D.N.J. 1987)
- New York* - *Delta Traffic Services v. Appco Paper & Plastics Corp.*, 1989 Fed.Car.Cas. Para. 83,426 (E.D.N.Y. 1988)

- North Carolina* - *Observer Transportation v. Service Merchandise*, 1989 Fed.Car.Cas. Para. 83,418 (W.D.N.C. 1988)
- Ohio* - *Delta Traffic Service v. E.L. Mustee & Sons*, 1988 Fed.Carr.Cas. Para. 83,407 (N.D. Ohio 1988) (vacating prior order of referral)
- Pennsylvania* - *Oneida Motor Freight, Inc. v. Pride Health Care*, 1987 Fed.Car.Cas. Para. 83,345 (M.D.Pa. 1987)
- Tennessee* - *Rebel Motor Freight, Inc. v. Muehlstein and Co., Inc.*, 1989 Fed.Car.Cas. Para. 83,449 (W.D.Tenn. 1989)
- Texas* - *Delta Traffic Service, Inc. v. Texas Cartage Terminal and Warehouse Corp.*, 1988 Fed.Car.Cas. Para. 83,384 (N.D.Tex. 1988)

APPENDIX G

**REPORTED COURT DECISIONS ADOPTING ICC
OPINIONS THAT NEGOTIATED RATES PRECLUDE
COLLECTION OF TARIFF CHARGES**

- Missouri - Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 705 F.Supp. 1401 (W.D.Mo. 1988)
- North Carolina - Cooper v. Delaware Valley Shippers Assoc.*, 1989 Fed.Car.Cas. Para. 83,466 (W.D.N.C. 1989)
- Oregon - Delta Traffic Service, Inc. v. Marine Lumber Co.*, 705 F.Supp. 513 (D.Ore. 1989)
- Pennsylvania - Breman's Express Company v. Mitchell Milling Co.*, 1988 Fed.Car.Cas. Para. 83,416 (Bkrt. Ct., W.D.Pa. 1988)
- Tennessee - Orr v. I.C.C.*, 703 F.Supp. 676 (W.D.Tenn. 1988)

APPENDIX H

**REPORTED COURT DECISIONS REJECTING ICC'S
CONCLUSIONS ON NEGOTIATED RATES ISSUE**

- Illinois - Orscheln Bros. Truck Lines v. Zenith Electric Corp.*, 1989 Fed.Car.Cas. Para. 83,428 (N.D. Ill. 1988)
- Ohio - Delta Traffic Services, Inc. v. Synthetic Products Co.*, 1988 Fed.Car.Cas. Para. 83,408 (N.D. Ohio 1988)
- Minnesota - INF, Ltd. v. Spectro Alloys Corp.*, 690 F.Supp. 808 (D.Minn. 1988)
- Mississippi - Robinson Truck Lines, Inc. v. Baldor Electric Co.*, 1988 Fed.Car.Cas. Para. 83,399 (Bkrt.Ct., N.D.Miss. 1988)
- Pennsylvania - Branch Motor Express Co. v. Caloric Corp.*, 1989 Fed.Car.Cas. Para. 83,445 (E.D.Pa. 1989)

No. 89-624

Supreme Court, U.S.

FILED

DEC 16 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL.,

Petitioners,

vs.

PRIMARY STEEL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI**

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December 16, 1989

32178

i.

**Counterstatement of Question
Presented for Review**

Whether the Interstate Commerce Commission, in exercising its primary jurisdiction under 49 U.S.C. §10701(a), may determine that it is an unreasonable practice for a motor carrier to collect higher charges from a shipper after negotiating the originally charged rate and representing to the shipper that the negotiated rate was properly published with the Interstate Commerce Commission, and whether such a determination by the Interstate Commerce Commission may be relied upon by a court.

ii.

Parties to the Proceeding Below

Appellants in the United States Court of Appeals for the Eighth Circuit, and Petitioners herein, are Maislin Industries, U.S., Inc., and its subsidiary operating companies, *viz.*, Gateway Transportation, Inc., Quinn Freight Lines, Inc., Richmond Cartage Corporation, MI Acquisition Corporation, and Maislin Transport of Delaware, Inc.

Appellee in the United States Court of Appeals for the Eighth Circuit, and Respondent herein, is Primary Steel, Inc.* The Interstate Commerce Commission was permitted to intervene as a party to the proceeding below in support of the Appellee.

* The parent companies of Primary Steel, Inc. are: Intercontinental Affiliates & Partners; Golodetz Corporation; Golodetz Trading Corp.; and Primary Industries Corporation.

iii.

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IN THE
Supreme Court of the United States

October Term, 1989

No. 89-624

MAISLIN INDUSTRIES, U.S., INC., *ET AL.*,
Petitioners,

vs.

PRIMARY STEEL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI**

Respondent, Primary Steel, Inc., prays that the Petition For Writ Of Certiorari ("Petition") filed by the Petitioners, requesting the review of the judgment of the United States Court of Appeals for the Eighth Circuit, filed on July 17, 1989 in the proceeding styled *Maislin Industries, U.S., Inc., et al. v. Primary Steel, Inc.*, Docket No. 85-0021-CV-W-JWO, be denied in its entirety.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 879 F.2d 400 (8th Cir. 1989), and is reprinted as Appendix A to the Petition.

The memorandum and orders of the United States District Court for the Western District of Missouri, Western Division, granting summary judgment for the Respondent is reported at 705 F.Supp. 1401 (W.D. Mo. 1988), and is reprinted as Appendix B to the Petition.

The opinion of the Interstate Commerce Commission relied upon by the District Court and the Court of Appeals was served on January 19, 1988 at *Primary Steel, Inc. v. Maislin Industries, U.S., Inc., et al.*, Docket No. MC-C-10961. The opinion is unreported, and is reprinted as Appendix C to the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Statutes Involved

49 U.S.C. §10701 Standards For Rates, Classifications, Through Routes, Rules, And Practices

(a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable

49 U.S.C. §10761 Transportation Prohibited Without Tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device

Counterstatement of the Case

This proceeding was instituted on January 8, 1985 by the filing of a complaint with the United States District Court for the Western District of Missouri, Western Division, by Maislin Industries, U.S., Inc. ("Maislin"). Also named as plaintiffs in the complaint were Quinn Freight Lines, Inc. ("Quinn"); Gateway Transportation Co., Inc.; Richmond Cartage Corporation; and Maislin Transport of Delaware, Inc., each of which were divisions or subsidiaries of Maislin and were interstate common carriers of property under certificates issued by the Interstate Commerce Commission ("ICC"). Maislin and its divisions or subsidiaries are debtor and debtor-in-possession in Chapter 11 bankruptcy proceedings pending in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division.

The complaint alleged that Primary Steel, Inc. ("Primary") underpaid Maislin for 1,081 of Primary's shipments of steel products transported by Maislin's division or subsidiary, Quinn, during the period of January, 1981 through November, 1983, by the sum of \$187,923.36, plus interest and costs. Maislin's claim for undercharges was based on its contention that despite the fact that Primary had, prior to the bankruptcy, timely paid all charges billed to it at rates agreed upon by the parties, those rates were inapplicable under tariffs filed pursuant to 49 U.S.C. §10761(a). Thus, the claimed undercharges represented the difference between the rates negotiated by the parties and paid by Primary, and the tariff rates assessed by Maislin two or more years after the shipments took place.

On March 22, 1985, pursuant to 49 C.F.R. §1111.1, *et seq.*, Primary instituted a formal complaint proceeding before the ICC at Docket No. MC-C-10961 alleging, *inter*

alia, that the rates sought to be applied to the 1,081 shipments by Maislin were unreasonable, unlawful and unjust, in violation of 49 U.S.C. §10701(a), and that Maislin's practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed constituted an unreasonable, unlawful, unfair and deceptive practice in violation of 49 U.S.C. §10701(a).

Primary then filed a motion on April 2, 1985 with the District Court requesting that under the doctrine of "primary jurisdiction" the proceeding be referred to the ICC for a determination of the issues of the reasonableness and applicability of Maislin's tariffs, and the assessed freight rates and practices thereunder, at issue in the complaint. Maislin opposed the motion arguing that the equitable defenses raised by Primary were invalid as a matter of law, and referral to the ICC would serve no useful purpose.

The District Court, by order entered on September 3, 1985, granted Primary's motion and ordered that the issues and controversy raised in the complaint be referred to the ICC for determination. The referral was grounded on the application of the doctrine of primary jurisdiction, and the determination by the District Court that the reasonableness of Maislin's billing practice of assessing and rebilling higher rates than those originally quoted and billed was the particular type of controversy that should be resolved by the application of the ICC's special competence, expertise and administrative discretion.

The ICC served its decision on January 19, 1988, and relying on its earlier decision in *National Industrial Transportation League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*Negotiated Rates*"),

concluded that it would be an unreasonable practice under 49 U.S.C. §§10701(a) and 10761(a) to require Primary to pay the claimed undercharges. *Negotiated Rates* was a rulemaking proceeding wherein the ICC adopted a policy statement holding that, in the highly competitive environment following the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, July 1, 1980, which amended the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.*, under certain circumstances the filed rate doctrine does not prohibit the assertion of equitable defenses.

In applying *Negotiated Rates*, the ICC made extensive factual findings that Maislin's division or subsidiary, Quinn, over a continuing period of time offered Primary transportation at various quoted rates which Primary accepted; that Primary reasonably relied on Quinn to publish the quoted rates with the ICC pursuant to 49 U.S.C. §10761(a); that Quinn's failure to properly publish the quoted and agreed upon rates in tariffs, should under the circumstances, preclude Quinn's later collection of undercharges; that there was no evidence that Primary agreed to pay more than the amount Quinn originally quoted and billed for each shipment; that there was no evidence that Quinn even demanded additional amounts over the amounts billed at any time during the business relationship with Primary; that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services performed; and that the amounts were reached as the result of negotiation between the parties, and because full payment was made by Primary, Quinn was equitably entitled to collect no further charges from Primary. Because of its finding of an unreasonable practice in violation of 49 U.S.C. §10701(a), the ICC did not address the reasonableness of the rate levels.

Subsequently, Primary moved for summary judgment requesting that the District Court afford substantial deference to, and affirm, the ICC's decision. Maislin also moved for summary judgment contending that the ICC's decision was merely an advisory opinion and was contrary to law. The District Court, by memorandum and orders filed on July 22, 1988, granted summary judgment and conclusions of the District Court. In the opinion, the Court of Appeals determined that the collection of the undercharges would be an unreasonable and unlawful practice, were supported by substantial evidence and should be affirmed.

On August 19, 1988, Maislin filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. The ICC, upon motion, was permitted to intervene in support of Primary. Following the submission of briefs and oral argument, on July 17, 1989, the Court of Appeals issued an opinion affirming the judgment and conclusions of the District Court. In the opinion, the Court of Appeals determined that that referral of the proceeding by the District Court to the ICC was correct, and that the issue of the reasonableness of Maislin's billing practices was within the ICC's primary jurisdiction. Finding that nothing prohibits the ICC from changing its policy on enforcing the unreasonable practice provision of 49 U.S.C. §10701(a), the Court of Appeals concluded that the ICC's change in policy and consideration of equitable defenses was justified and consistent with its "practices" jurisdiction under the Interstate Commerce Act. The Court of Appeals also found that the ICC's consideration of equitable defenses was a reasonable attempt to harmonize the competing provisions of 49 U.S.C. §10701(a), which mandates that tariff rates and practices

be reasonable, with the provisions of 49 U.S.C. §10761(a), which mandates the collection of tariff rates. The Court of Appeals also disregarded Maislin's argument that the ICC's decision was merely an "advisory" decision, finding that the ICC had recognized that its responsibility was to evaluate the reasonableness of a practice, while the District Court retained the authority to structure a proper remedy. Lastly, the Court of Appeals determined that Maislin's claim for prejudgment interest was not required to be addressed, because Primary was not liable for the claimed undercharges.

Reasons for Denying Petition

The Court of Appeals committed no error in affirming the District Court's adoption of the ICC's decision determining that it would be an unreasonable practice pursuant to 49 U.S.C. §10701(a) to require Primary to pay the claimed undercharges representing the difference between the rates negotiated by the parties and the tariff rates. The ICC, in exercising its special competence, expertise, and administrative discretion, and acting within its primary jurisdiction, provided a reasoned and correct statutory construction of 49 U.S.C. §§10701(a) and 10761(a). The ICC's statutory construction also provided a reasonable accommodation between competing sections of the Interstate Commerce Act. The Court of Appeals did not commit error in finding that the District Court properly accorded substantial deference to the ICC's decision. Thus, the decision of the Court of Appeals is fully consistent with established federal law and further review is not warranted.

ARGUMENT

A. The decision of the Court of Appeals is fully consistent with established federal law and further review is not warranted.

1. The Court Of Appeals Correctly Found That Equitable Defenses Can Be Considered Pursuant To 49 U.S.C. §10701(a) To Determine The Reasonableness Of A Carrier's Billing Practices.

Maislin's primary argument in the Petition is that the Court of Appeals committed error by disregarding past precedents in affirming the District Court's acceptance of the ICC's determination that Primary is permitted to raise equitable defenses to claimed undercharges (Petition at 8-9; 11-12). The Court of Appeals thoroughly reviewed the precedents and the pertinent provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. §10101, *et seq.*, and correctly rejected the argument by concluding that the decision on referral demonstrated the ICC's continuing evolution of its view on the relevance of negotiated rates in determining the reasonableness of a motor carrier's billing practices under 49 U.S.C. §10701(a).

The traditional view had been that ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rates. *See, e.g., Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494 (1915). However, in recent years the ICC has reexamined the issue. In *Buckeye Cellulose Corp. v. Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom., Seaboard System R.R. Co. v. United States*, 794 F.2d 635 (11th Cir. 1986), the Eleventh Circuit affirmed the ICC's decision to order the waiver of undercharges pursuant to 49 U.S.C. §§10701(a) and 10704(a)(1) based on a rail carrier's rate misquotations. The case arose from a

proceeding before the ICC where the shipper contended that the railroad intentionally misquoted a rate to the shipper, and that the attempt by the railroad to collect resultant undercharges from the shipper was an unreasonable practice. The ICC specifically found that the shipper did not pay the applicable tariff rate, but determined that under the circumstances presented the collection of undercharges in itself was an unreasonable practice. The ICC also reversed its prior position that the equitable defense of a carrier rate misquotation was not a defense to a claim for undercharges by a carrier. The Eleventh Circuit found that the ICC was "... both justified and within its jurisdiction", and that "[n]othing prohibits the ICC from changing its policy on enforcing the 'unreasonable practice' provision of section 10701(a)". *Id.* at 638.

Subsequently, the ICC in its decision in the rulemaking proceeding at *National Industrial Transportation League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*Negotiated Rates*"), adopted a policy statement providing that the filed rate doctrine does not necessarily bar the consideration by the ICC of equitable defenses against claims for undercharges. The ICC noted in the decision that the passage of the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793, July 1, 1980, had "dramatically altered the competitive atmosphere of the motor carrier industry", resulted in "intense, new competition," and required "carriers to price competitively and on extremely short notice" in order to retain or obtain new traffic. *Id.* at 105. As a result, the ICC found that shippers are required to daily negotiate "hundreds, or even thousands" of individual rates, and it is "extremely difficult for shippers to

determine, prior to movement, whether the agreed rate is actually on file". *Id.* at 105. The issue, as summarized by the ICC, was:

... whether a shipper must pay the rate established in a tariff where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged (and therefore presumably filed as a tariff). [Footnote omitted] We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach. *Id.* at 105-06.

Concluding that permitting equitable defenses comports with the spirit of the MCA, the ICC stated that upon referral from a court it would decide whether, under all "relevant circumstances", the collection of undercharges would be an unreasonable practice. *Id.* at 107.¹

The Court of Appeals, citing the *Seaboard System* and *Negotiated Rates* decisions with approval, properly concluded that nothing prohibits the ICC from changing its policy on enforcing the unreasonable practice provision of 49 U.S.C. 10701(a), and that changed circumstances warranted reexamination by the ICC of its previous policy of refusing to consider equitable

¹The ICC's later decision in *National Industrial Transportation League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (served June 29, 1989), supplemented the earlier decision and reiterated that the rate filing requirements under 49 U.S.C. §10761(a) remain in effect but also held that the assessment of such rates may be found to be an unreasonable practice under appropriate circumstances. *Id.* at 627, 631.

defenses.² These findings by the Court of Appeals are fully supported by past precedents, and should not be disturbed by this Court.

Maislin further argues in the Petition that *Louisville & Nashville R.R. Co. v. Maxwell*, *supra* and *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922 (1986), reaffirmed the validity of the filed rate doctrine by prohibiting any deviation from the terms of a filed tariff (Petition at 8, 12, 21). The Court of Appeals considered this argument and properly found that Maislin's reliance on those decisions was untenable.

... In *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), the Supreme Court held that shippers could not use antitrust law to challenge the legality of tariff rates filed with the ICC, even where the carrier conspired to fix rates in violation of the Sherman Act, because the rates had been approved by the ICC. *Id.* at 416-17. In *Maxwell*, the Supreme Court held that the lawfully filed rate of the carrier must be charged by the carrier and paid by the shipper, and that a shipper is not excused from paying the full amount of the filed tariff. In both *Square D* and *Maxwell*, however, the rates enforced by the Court were presumptively reasonable because they had been approved by the ICC. Therefore, collection of those rates was mandated by law. Neither case concerned rates or practices deemed to be unreasonable by the ICC. The "courts have never held that the Commission lacks authority to prohibit

² In *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989), a case involving a similar factual situation and argued before the Eighth Circuit on the same day as this proceeding, the District Court had referred the proceeding to the ICC, but citing the filed rate doctrine refused to affirm the ICC's decision. The Court of Appeals, relying on the decision in this proceeding, reversed the District Court and held that the reasonableness of the carrier's billing practices was within the primary jurisdiction of the ICC, and that the District Court should have deferred to the ICC's decision. *Id.* at 548.

the unreasonable collection of undercharges" under section 10701. *Seaboard*, 794 F.2d at 638 (emphasis added) (Petition, Appendix A at 9a).

Maislin cites two cases decided by the United States Court of Appeals for the Eighth Circuit, *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986) and *Missouri Pacific R.R. Co. v. Rutledge Oil Co.*, 669 F.2d 557 (1982), in support of its contention that the filed rate doctrine prohibits the consideration of equitable defenses (Petition at 8). Both cases are inapposite, because neither case involved a situation where the shipper sought to defend a carrier undercharge action by having the case referred to the ICC to determine whether the carrier's practices were reasonable. *Paulson* involved a shipper which sued a motor carrier for the failure to timely deliver an express package. *Missouri Pacific* involved the application of an estoppel defense to the collection of demurrage charges. In neither case did the Eighth Circuit address in any manner the ICC's authority pursuant to 49 U.S.C. §10701(a) to determine the reasonableness of a motor carrier's practices.

Maislin also argues in the Petition that the Court of Appeals decision "squarely conflicts" with the decision of the United States Court of Appeals for the Fifth Circuit in *Matter of Caravan Refrigerated Express, Inc.*, 864 F.2d 388 (5th Cir. 1989), rehearing denied March 1, 1989, petition for writ of certiorari pending in No. 88-1958, *sub nom. Supreme Beef Processors, Inc. v. Yaquinto* (Petition at 8-9). In that decision, the Fifth Circuit held that under the filed rate doctrine, a motor carrier which had negotiated a rate with a shipper for less than the tariff rate, could collect undercharges. However, unlike this proceeding, the *Caravan Refrigerated* decision did not involve a referral under the

primary jurisdiction doctrine to the ICC and the subsequent consideration of the ICC's decision following the referral.

The finding by the Court of Appeals in this proceeding that equitable defenses can be considered pursuant to 49 U.S.C. §10701(a) to determine the reasonableness of a motor carrier's billing practices is fully consistent with precedent and comports with the pertinent provisions of the ICA and, therefore, no further review is warranted.

2. The Determination Of The Reasonableness Of Maislin's Billing Practices Under 49 U.S.C. §10701(a) Is Within The ICC's Primary Jurisdiction.

In the Petition, Maislin contends that the Court of Appeals committed error in finding that the issue of the reasonableness of Maislin's billing practices before the District Court was an issue properly within the ICC's primary jurisdiction. Maislin further contends that this issue is a question of law and within the competence of the judiciary (Petition at 8-10). Both contentions are without merit.

The conclusion of the Court of Appeals, that under the doctrine of primary jurisdiction the reasonableness of Maislin's billing practices were properly determined by the ICC, is fully supported by precedent. This Court has considered the application of the doctrine of primary jurisdiction on various occasions and determined that it should be exercised by the courts if the issues in the proceeding "turn on a determination of the reasonableness of a challenged practice," or raise a "question of the validity of a rate or practice." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-306, 96 S.Ct. 1978, 1987-88 (1976). The doctrine should also be exercised over any matter that "... raises issues of transportation policy which ought to be considered by

the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the ICA]." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65, 77 S.Ct. 161, 166 (1956). See also *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-32, 60 S.Ct. 325, 329 (1940).

The lower courts have also made clear that the issue of the reasonableness of practices sought to be applied by a carrier in its tariff should be referred in the first instance to the ICC for initial determination. As specifically noted by the Eleventh Circuit in *Seaboard System R.R., Inc. v. United States*, 794 F.2d at 638, "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." See also *Carriers Traffic Serv. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989); *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989); *Western Transp. Co. v. Wilson & Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982); *Iowa Beef Processors v. Ill. Central Gulf R. Co.*, 685 F.2d 255 (8th Cir. 1982). Lastly, as found by the Court of Appeals, the "majority of the lower federal courts presented with similar claims for undercharges have referred the issue to the ICC." (Petition, Appendix A at 6a).

The District Court's referral of the issue of the reasonableness of Maislin's billing practices to the ICC has been the traditional method utilized by courts for the determination of reasonableness issues arising under 49 U.S.C. 10701(a). Such issues are complicated matters which Congress entrusted to the ICC, and which the courts have long recognized to be properly determined by the ICC's special competence and expertise. *United States v. Western Pacific R.R. Co.*, 352 U.S. at 63-64, 77 S.Ct. at 164-65. The recognition by the Court of Appeals that the decision of whether to permit Maislin

to collect undercharges directly involved the reasonableness of its billing practices, and the Court of Appeals affirmance of the District Court's holding that the ICC had primary jurisdiction to determine the reasonableness of Maislin's billing practices, are fully supported by precedent and do not require review by this Court.

3. The ICC's Decision Is A Reasonable Accommodation Between Competing Sections Of The Interstate Commerce Act.

The essence of Maislin's argument in the Petition is that the filed rate doctrine requires the application of the provisions of 49 U.S.C. §10761(a) in a mechanical and slavish manner despite the fact that a carrier may have engaged in an unreasonable practice (Petition at 11-12, 13). By characterizing the dispute in this proceeding as only involving rate reasonableness, and refusing to recognize that the Court of Appeals, the District Court, and the ICC have all properly recognized that the dispute involves the issue of the reasonableness of Maislin's billing practices, Maislin incorrectly argues that the enforcement of the unreasonable practices doctrine must always be subordinated to the enforcement of the filed rate doctrine.

The filed rate doctrine embodied in 49 U.S.C. §10761(a), and the unreasonable practices doctrine embodied in 49 U.S.C. §10701(a), are both mandated by the ICA. Each of these statutory sections control in appropriate circumstances, and when the sections conflict the ICC is the proper forum for the resolution of such a dispute. The Court of Appeals squarely addressed this issue, finding that "[s]ection 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the Interstate Commerce Act

elevating this section over section 10701, which requires that tariff rates be reasonable." (Petition, Appendix A at 9a). See also *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 548. In the event of a dispute as to the application of the two statutory sections, the proper authority to harmonize these competing provisions is the ICC. *Seaboard System R.R. Co. v. United States*, 794 F.2d at 638. Under this approach, the ICC is exercising its authority to consider all the circumstances, including equitable defenses, to determine the reasonableness of the billing practices under 49 U.S.C. §10701(a), but it is not abolishing the requirement in 49 U.S.C. §10761(a) that a carrier must charge the tariff rate. *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 548; *Negotiated Rates*, 3 I.C.C.2d at 103.

The Court of Appeals properly determined that the ICC decision "represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act." (Petition, Appendix A at 12a). To find otherwise would have improperly granted validity to Maislin's attempt to give no effect, and in essence to write out of the ICA, the unreasonable practices doctrine embodied in 49 U.S.C. §10701(a).

4. The Statutory Provisions Of The Interstate Commerce Act Permit The ICC's Consideration Of The Unreasonable Practices Provision Of 49 U.S.C. §10701(a).

Maislin argues in its Petition that the ICC does not have the authority to change its policy concerning the filed rate doctrine because the MCA contained no specific statutory provisions authorizing such a change (Petition at 21-23). This argument is without merit.

It is well-settled that the ICC may alter its past interpretation, and if the ICC in resolving an issue departs from its settled precedent, it must adequately explain its change in policy. See, e.g., *Seaboard System R.R. Co. v. United States*, 794 F.2d at 639; *Intercity Transp. Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984). A court must accept such a change if the ICC's new interpretation is reasonable. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782 (1984). As stated by this Court in *American Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618 (1967):

... the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice ... Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

See also *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) (*en banc*), cert. denied, 466 U.S. 953, 104 S.Ct. 2160 (1984).

Based on the "relaxed regulatory requirements" in the MCA, and the ICC's determination that the enforcement of the unreasonable practices provision of 49 U.S.C. §10701(a) would not undermine the anti-discrimination goals of the filed rate doctrine, the Court of Appeals properly concluded that the ICC's new interpretation permitting the assertion of equitable defenses was reasonable (Petition, Appendix A at 11a).

Citing *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692 (1951) and *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 79 S.Ct. 904 (1959), Maislin states that those decisions left purchasers of motor common carriage without any remedy whatsoever with respect to unreasonable rates on past shipments. Maislin then argues that the statutory remedy created by Congress with the enactment of Pub. L. 89-170, 79 Stat. 651, September 6, 1965, only provided a reparations remedy for unreasonable rates, and did not provide a cause of action or defense for an unreasonable carrier practice (Petition at 13-20).

As is apparent from this Court's decision in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 83 S.Ct. 157 (1962), Maislin's argument is without merit. In *Hewitt-Robins*, a shipper brought an action against a carrier and asserted that the carrier's practice of billing the shipper at a higher interstate rate rather than at a lower intrastate was unreasonable. In reversing the Court of Appeals, this Court held that the prior decision in *T.I.M.E.* was not controlling and confirmed that a shipper may assert the statutory unreasonableness of past motor carrier practices in court proceedings, and then obtain referral of such issues to the ICC for substantive determination. *Id.* at 85, 83 S.Ct. at 158. This Court also noted that similar assertions of the past unreasonableness of motor carrier rates were not permitted under *T.I.M.E.* and the then existing law.

In 1965, Congress reversed the prohibition pertaining to rate unreasonableness, by amending the ICA. Pub. L. 89-170, 79 Stat. 651, September 6, 1965 (amending then 49 U.S.C. §304(a)). By this action, Congress restored the existence of parallel remedies in post-shipment damage litigation involving either unreasonable rates or unreasonable practices which had existed prior to *T.I.M.E.* and *Hewitt-Robins*. When the ICA was recodified in 1978, Pub. L. 95-473, 92 Stat. 1337, October 17, 1978, unitary provisions were created to continue post-shipment damage remedies applying to both unreasonable rates and unreasonable practices. See 49 U.S.C. §§10701(a), 10704(b)(1), 11705(b)(3), 11705(c)(1) and 11706(c)(2). This combination of prior separate provisions in the recodification merely corrected variances and inconsistencies in the use of synonymous terms in the prior statute. See Historical Revision Notes, following 49 U.S.C. §10101, 49 USCA Transportation [partial revision], 1989 Pamphlet, at 97-98. See also *Purolator Courier Corp. v. I.C.C.*, 598 F.2d 225, 227, n.5 (D.C. Cir. 1979) (enactment of the recodified ICA was not intended to make substantive changes to the original ICA, but the new language may serve as a guide to the meaning of the original ICA). Thus, the referral procedures are identical whether a shipper in a court proceeding pleads a defense of unreasonable rates or unreasonable practices.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition For Writ Of Certiorari be denied in its entirety.

Respectfully submitted,

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No. 89-624

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL., PETITIONERS

v.

PRIMARY STEEL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether, in a motor carrier's civil action against a shipper for undercharges based on a filed tariff rate, a court is required under the primary jurisdiction doctrine to refer to the Interstate Commerce Commission the question whether the carrier's assessment of the tariff rate would involve an unreasonable practice in violation of 49 U.S.C. 10701(a).

2. Whether the ICC's determination that a motor common carrier should be denied recovery of its tariff rate, because of its unreasonable practices in failing to file the negotiated rate originally charged, is compatible with the "filed rate" doctrine.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-624

MAISLIN INDUSTRIES, U.S., INC., ET AL., PETITIONERS

v.

PRIMARY STEEL, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.2d 400. The opinion of the district court (Pet. App. 14a-26a) is reported at 705 F. Supp. 1401. The decision of the Interstate Commerce Commission (Pet. App. 28a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a) was entered on July 17, 1989. The petition for a writ of certiorari was filed on October 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, regulates interstate transportation by motor carriers. A carrier

providing transportation subject to regulation under the Act may do so only if the carrier has an effective tariff on file with the Interstate Commerce Commission (ICC). 49 U.S.C. 10761(a), 10762(a)(1). In order to protect shippers against discriminatory rates, the Act further provides that a carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a). The Act also imposes a requirement that a carrier's "rate[s]" and "practice[s]" be reasonable. 49 U.S.C. 10701(a). The authority to enforce the requirement of reasonable rates and practices is reposed in the ICC. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987). If the ICC determines that a carrier is engaging in a practice that is or will be unreasonable, the ICC "shall prescribe the * * * practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987).

2. From 1981 to 1983, a division of Maislin Industries, U.S., Inc. (Maislin) operating as a motor common carrier made over 1,000 shipments of steel for Primary Steel, Inc. (Primary). Primary negotiated rates with Maislin for this transportation, with the understanding that Maislin would file the rates in tariffs with the ICC. Maislin, however, failed to file the rates in proper tariffs. The actual tariff rates applicable to the shipments were higher than those to which the parties had agreed. Pet. App. 2a. Following Maislin's bankruptcy, an audit agency appointed by the bankruptcy court discovered the difference between the rates charged Primary and Maislin's tariff rates. Maislin then commenced an action in district court to recover those undercharges. *Ibid.*

3. Relying on the primary jurisdiction doctrine, the district court referred to the ICC Primary's claim that it was an unreasonable practice for Maislin to require payment of the undercharges. Pet. App. 14a, 17a-19a. In reviewing Primary's claim, the ICC applied its policy statement in *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) [hereinafter *Negotiated Rates I*]. There, the Commission noted, it had determined that the "filed rate" doctrine did not bar the

ICC from determining, in a particular case, that a carrier had engaged in an unreasonable practice under 49 U.S.C. 10701(a) and 10704 that would preclude the carrier from later assessing the filed tariff rate. The Commission observed that the filed rate doctrine has traditionally been understood to preclude equitable defenses from defeating a carrier's right to recover undercharges in a judicial collection action. The ICC explained, however, that this should not cabin the Commission's authority under its unreasonable practice jurisdiction. The ICC recognized that *Negotiated Rates I* represented a departure from its past policy, but it justified this change by pointing to the congressional emphasis on competitive pricing in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, and the diminished need to deter rate discrimination in favor of particular shippers, given the current regulatory environment encouraging pricing flexibility. Pet. App. 33a-36a.

The ICC then proceeded to consider whether Maislin's practices were in fact unreasonable. On the basis of extensive factual findings, the ICC concluded that Maislin and Primary had negotiated particular rates, that Maislin had billed at those rates, and that Primary had a reasonable basis for relying on Maislin properly to implement those rates. Pet. App. 36a-43a. Consequently, the ICC found that "it would be an unreasonable practice now to require Primary to pay undercharges for the difference between the negotiated rates and the tariff rates." *Id.* at 44a.

On the basis of the ICC's order, the district court granted summary judgment in favor of Primary. The court rejected Maislin's arguments that the ICC had exceeded its statutory authority and that its order was barred by the filed rate doctrine. The court also determined that the ICC's order was supported by substantial evidence, and was neither arbitrary nor capricious. Pet. App. 19a-25a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court first held that the ICC had primary jurisdiction over the claim that Maislin had engaged in an unreasonable practice by

negotiating and charging one rate and then rebilling to collect a tariff rate higher than that originally charged. Relying on *United States v. Western Pacific R.R.*, 352 U.S. 59, 65 (1956), the court reasoned that the considerations of agency expertise and the uniform development of policy that underlie the primary jurisdiction doctrine apply with full force here. The court explained that the reasonableness of a carrier's practices is just as much within the primary jurisdiction doctrine as the reasonableness of a carrier's rates. The court also noted that other courts had agreed that allegations of the unreasonable collection of overcharges fall within the zone of the ICC's primary jurisdiction. Pet. App. 6a (citing *Seaboard System R.R. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986)).

The court next turned to the argument that the filed rate doctrine bars the ICC from finding that Maislin had engaged in an unreasonable practice. The court noted that the statutory source of the filed rate doctrine, 49 U.S.C. 10761(a), requires a carrier to charge the full tariff rate, and that prior decisions of this Court had strictly precluded equitable defenses based on ignorance or misquotation of the filed tariff. Pet. App. 7a (citing *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915)). The rule applied in those cases, the court observed, served the purpose of preventing discriminatory treatment of shippers. The court explained, however, that the ICC has separate statutory authority to require carriers to engage in reasonable practices. In the event that the provisions governing the collection of rates and the reasonableness of practices conflict, "the proper authority to harmonize these competing provisions is the ICC." Pet. App. 9a.¹

Applying those considerations, the court held that the ICC's *Negotiated Rates* analysis was a reasonable accommodation of statutory policies. The court found that the ICC's policy was consistent with the requirement that a carrier charge the filed

¹ The court distinguished *Negotiated Rates I* from the holdings of *Maxwell* and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), because, although both of those cases supported the enforcement of filed rates, neither involved "rates or practices deemed to be unreasonable by the ICC." Pet. App. 9a.

rate; the effect of the policy was to temper the consequences of that doctrine for shippers who reasonably rely on a carrier's quotation of a negotiated rate. Pet. App. 12a. The court noted that the ICC had properly explained its change in policy by referring to the relaxation of regulatory requirements under the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. Pet. App. 12a. Absence of a specific legislative command, the court stated, did not impair the agency's authority to reinterpret its governing statute in light of changed conditions. The ICC had reasonably determined, the court concluded, that "in light of the regulatory changes 'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between the shippers.'" *Ibid.* (quoting *Seaboard System R.R. v. United States*, 794 F.2d at 638).

DISCUSSION

The court of appeals correctly upheld the ICC's *Negotiated Rates* policy as a proper exercise of the agency's discretion. We agree with petitioners, however, that the decision is in conflict with a recent decision of the Fifth Circuit over the application of the primary jurisdiction doctrine to a claim based on *Negotiated Rates*.² We also believe that, in view of the large number of cases raising the question presented here and the issue's importance in the interpretation of the Interstate Commerce Act, this Court's review is warranted.

I. a. The filed rate doctrine embodies the principle that neither misquotation by the carrier nor the shipper's ignorance of the tariff rate affords a defense to the carrier's action filed in court to collect the filed rate. See, e.g., *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915); *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 196-197 (1913);

² *Caravan Refrigerated Cargo, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), petition for cert. pending No. 88-1958. At the Court's invitation, we have filed a brief in that case and have provided a copy to the parties here.

Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 520 (1939). *Maxwell*, however, states an important qualification to the filed rate doctrine: the filed rate governs "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. That qualification reflects not only the statutory command that a carrier's rates must be reasonable, 49 U.S.C. 10701(a), but also the parallel principle that the Commission alone can determine the reasonableness of rates. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co. v. Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932).

Under the primary jurisdiction doctrine, "[w]hen a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). This rule protects the ICC's uniform development of policy, as envisioned by Congress, and ensures application of agency expertise to questions requiring thorough knowledge of industry conditions. *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956); *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 255-259 (1913). The primary jurisdiction doctrine applies equally to claims of unreasonable rates and claims of unreasonable practices. *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976).

b. The ICC's *Negotiated Rates* policy was formulated against the background of those principles. Responding to a surge in undercharge actions like the present case, a national shippers' association asked the ICC to address the problem. In *Negotiated Rates I*, the ICC announced that it would conduct an "advisory analysis," on referral from a court under the primary jurisdiction doctrine, to "determine * * * whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect." 3 I.C.C.2d at 107.

To clarify its policy and to respond to another petition from a shippers' association, the ICC issued a second statement in *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623, 626 (1989) [hereinafter *Negotiated Rates II*], explaining that its negotiated-rates determinations implement the statutory requirement that a carrier's practices must be reasonable and that those determinations do not rest solely on "equitable" considerations. *Id.* at 628 & n.11. The ICC also noted that negotiated-rates determinations are not "advisory opinion[s]," but result in "binding and dispositive" orders, subject to review only for arbitrariness and caprice. *Id.* at 624. Finally, to ensure evenhanded application of its policy in light of the refusal of some courts to refer such claims, the ICC announced that it would rule on negotiated-rates allegations by shippers without awaiting a court referral. *Id.* at 635-636.

2. a. The ICC's *Negotiated Rates* policy does not contravene the filed rate doctrine, as petitioners would have it (Pet. 12-13). As we explain more fully in our amicus brief (at 11-16) in *Supreme Beef Processors, Inc. v. Yaquinto*, No. 88-1958, this Court's many decisions holding that a court may not permit an equitable defense to override the carrier's right to collect the filed rate do not affect the Commission's power to implement the statutory requirement of reasonableness. To the contrary, that power has long been recognized as a co-equal requirement of the Act. See *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. at 97; *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922) (the tariff rate governs "[u]nless and until suspended or set aside" by the ICC). For courts to determine in individual cases whether enforcement of the filed rate is inequitable would seriously undermine the ICC's primary jurisdiction and would give rise to a lack of uniformity in application of the statute. Those considerations, however, are absent when the ICC itself determines that a carrier has committed an unreasonable practice that bars its collection of the filed rate.

Although the ICC's current application of its unreasonable practice powers represents a change from prior practice, the Commission is free to revise its interpretation of the statutory

provisions it administers to respond to changed conditions. *American Trucking Ass'n v. Atchison T.&S.F. Ry.*, 387 U.S. 397, 416 (1967). That principle has particular force here in light of Congress's substantial amendment of the transportation policy of the United States in the Motor Carrier Act of 1980. See U.S. Amicus Br. at 12, *Supreme Beef Processors, Inc. v. Yaquinto*, No. 88-1958. The 1980 Act directs the ICC to apply a new policy of "promot[ing] competitive and efficient transportation services," in order to achieve, among other things, "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping public."³ The implementation of that goal warrants the ICC's reconsideration of the policy of requiring a shipper to bear the full consequences of a carrier's failure properly to file negotiated rates.

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986), does not require a different result. There, the Court held that the policies expressed in the 1980 Act were not sufficient to justify overruling this Court's decision in *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), which had precluded antitrust treble damages actions based on tariff rates filed under an ICC-approved agreement. *Square D* relied heavily on *stare decisis* (476 U.S. at 424), but that principle does not constrain the Commission's power to reinterpret its governing statute in light of changed conditions. Indeed, the Commission would be remiss if it failed to revisit its past policies to take account of Congress' articulation in 1980 of a new pro-competition policy in regulating motor carriers.

Contrary to petitioners' view (Pet. 19 n.6), the ICC's *Negotiated Rates* policy does not free carriers from filing their rates in proper tariffs with the ICC (49 U.S.C. 10762(a)(1)), nor does it announce a universal rule that a negotiated rate prevails over a filed rate (49 U.S.C. 10761(a)).⁴ Compare *Regular Com-*

³ Motor Carrier Act of 1980, Pub. L. No. 96-296, § 4, 94 Stat. 794 (codified at 49 U.S.C. 10101(a)(2)).

⁴ Nor does the ICC's policy transgress other provisions that support the filed rate requirement. See Pet. 20. The Act creates civil liability for a shipper's

mon Carrier Conference v. United States, 793 F.2d 376, 379 (D.C. Cir. 1986). Rather, the policy formulates a remedy, under the ICC's authority to police unreasonable practices, when a carrier has negotiated and charged one rate, has failed to file that rate in a tariff with the ICC, and then seeks to recover from the shipper the higher, filed rate. This is entirely lawful and appropriate. The ICC's authority to administer the Act makes it the proper body to reconcile the congressional commands to foster competition while preventing discrimination between shippers. See *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 352, (1982) ("The remedies for a carrier's violation of the regulations are best left to the ICC for such resolution as it thinks proper."); *Seaboard System R.R. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986). See also *INF, Ltd. v. Spectro Alloys Corps.*, 881 F.2d 546 (8th Cir. 1989).

b. Relying principally on *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), petitioners contend (Pet. 13-21) that the ICC's *Negotiated Rates* policy improperly provides a remedy for past unreasonable practices when Congress intended none to exist under the statutory scheme. The argument proceeds as follows: petitioners first note that the Motor Carrier Act of 1935, 49 U.S.C. 502 *et seq.* (1935 Act) did not provide a reparations remedy for a shipper to recover for past unreasonable practices or rates. Petitioners next state that *T.I.M.E.* construed the remedial scheme of the 1935 Act to preclude a court from referring to the ICC the shipper's defense to an undercharge action that the tariff rate is unreasonable. Petitioners continue that although Congress in 1965 overruled *T.I.M.E.* and provided a reparations remedy for past unreasonable rates, Congress provided no parallel remedy for past unreasonable practices. Thus,

knowing receipt of a rebate (49 U.S.C. 11902) and criminal liability for the knowing provision or receipt of transportation at below-tariff rates (49 U.S.C. 11903). A shipper that violates those provisions by knowingly paying an unfilled rate would be barred from taking advantage of the Commission's *Negotiated Rates* policy (because reliance on the applicability of the negotiated rate must be reasonable). A carrier that violates those provisions is hardly in a position to complain if it is later denied the windfall of a higher tariff rate that exists only because it ignored its duty to make a timely filing.

petitioners conclude, to refer an unreasonable practice claim to the ICC in the midst of an undercharge case would "permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly." *T.I.M.E.*, 359 U.S. at 475.

Petitioners' argument misreads the implications of *T.I.M.E.* and ignores this Court's subsequent narrowing of that decision. Even before Congress expressly overruled *T.I.M.E.*,⁵ this Court had substantially confined its scope in *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962). There, the Court permitted a shipper to file suit against a carrier for unreasonable routing practices that caused the shipper to make excess payments, and to obtain referral of that claim to the ICC. The Court held that the reasonableness of a carrier's routing practices falls within the ICC's primary jurisdiction, and that the absence of reparations authority did not prevent the ICC from determining the issue on referral from a court. "Indeed, the doctrine of primary jurisdiction is designed to apply 'where a claim is originally cognizable in the courts, and . . . enforcement of the claim requires the resolution of issues . . . placed within the special competence of an administrative body.'" 371 U.S. at 88-89 (quoting *United States v. Western Pacific R.R.*, 352 U.S. at 64).

Hewitt-Robins thus makes clear that the availability of a remedy for an unreasonable practice "depends on the effect of the exercise of the remedy upon the statutory scheme of regulation." 371 U.S. at 89. Here, the ICC has determined that, in limited circumstances, a carrier's action to collect the filed rate may be incompatible with the reasonable-practice provision of the statute. The determination of that issue when raised in a car-

⁵ Congress overruled *T.I.M.E.* in the Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 (codified at 49 U.S.C. 11705(b)(3) (1982 & Supp. V 1987), 49 U.S.C. 11706(c)(2)). See H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965). Courts and the ICC have interpreted this legislation to require a shipper to seek reparations in court, whereupon the court refers to the Commission the issue of reasonableness. See *United States v. Associated Transp., Inc.*, 505 F.2d 366, 368-369 (D.C. Cir. 1974); *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403 (1969).

rier's collection action may properly be referred to the ICC, regardless of any doubt about the shipper's independent right to reparations for such practices. If Congress had intended in the 1965 amendments to foreclose an existing remedy for past unreasonable practices, it would have made that intention explicit. The legislative history discloses precisely the opposite intent.⁶

In any event, petitioners' assumption that a reparations remedy is not available for the past unreasonable practice at issue in this case is at best debatable. To be sure, the statute expressly authorizes reparations against motor carriers only for damages "resulting from the imposition of rates" that violate the statute and does not by its terms mention reparations for unlawful "practices." 49 U.S.C. 11705(b)(3) (1982 & Supp. V 1987).⁷ But the authority to award reparations "resulting from the imposition of rates" appears broad enough to encompass a claim based on a carrier's demand for a tariff rate that exceeds the negotiated rate.⁸ Any narrower reading of the provision would be entirely artificial, since the shipper's core complaint in a *Negotiated Rates* case is simply that imposing a tariff rate is unreasonable. While the ICC has described a *Negotiated Rates* claim as an unreasonable practice, a parallel analysis could be applied to declare that a negotiated, but unfiled rate is in certain

⁶ The legislative history confirms Congress's intent to "permit a court . . . to award reparations to persons injured through violations of the Interstate Commerce Act." The provision was designed to "restore" the procedures used by the ICC before *T.I.M.E.*, but "not [to] affect in any way the right of shippers to recover damages from misrouting under the Hewitt-Robins doctrine." H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965) (emphasis added).

⁷ By contrast, the statute is more explicit regarding the availability for reparations against rail or water carriers for unreasonable practices. See 49 U.S.C. 11705(b)(2) (authorizing reparations against rail or water carriers for "an act or omission . . . in violation of this [Act]").

⁸ The language of the original provision overruling *T.I.M.E.* is similarly broad. See Act of Sept. 6, 1965, Pub. L. No. 89-170, § 6, 79 Stat. 651 (defining "reparations" to mean "damages resulting from charges for transportation services to the extent that the Commission . . . finds them to have been unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.").

circumstances the maximum reasonable rate. See *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 807-809 (8th Cir. 1981) (upholding an ICC order prescribing, as a maximum reasonable rate, the rate negotiated between the parties rather than the tariff rate filed by the carrier). In that setting, reparations would clearly be allowed. Given that reparations could be awarded to shippers if their claim was described in terms of unreasonable rates rather than unreasonable practices, it can hardly be maintained that the referral to the ICC of a *Negotiated Rates* claim would undermine the statutory scheme.

3. The validity of the ICC's *Negotiated Rates* policy is an issue meriting review by this Court. The court of appeals' decision conflicts with a decision of the Fifth Circuit regarding the application of the primary jurisdiction doctrine to a claim based on *Negotiated Rates*. In *Caravan Refrigerated Cargo, Inc. v. Yaquinto*, 864 F.2d 388 (1989), petition for cert. pending, No. 88-1958, the court, in a holding that directly conflicts with the decision below, denied referral to the ICC of a *Negotiated Rates* claim. Moreover, nearly every other circuit has a pending case regarding the application of *Negotiated Rates*. See Pet. App. 45a-47a.⁹ The issue has also provoked inconsistent decisions from the district courts. Compare *id.* at 49a (granting referral) with *id.* at 50a-51a (denying referral). The ICC informs us that it has received 117 *Negotiated Rates* cases on referral from courts, and 80 cases filed directly with the agency. In view of the

⁹ See *Transtop, Inc. v. Delta Traffic Serv.*, No. 89-1662 (1st Cir. argued Nov. 7, 1989) (referral denied); *Delta Traffic Serv. v. Appco Paper & Plastics Corp.*, No. 89-9057 (2d Cir. argued Aug. 17, 1989) (referral denied); *Branch Motor Express v. Caloric Corp.*, No. 89-1330 (3d Cir. argued June 27, 1989) (referral granted); *Cooper v. Delaware Valley Shippers Ass'n*, No. 89-3259 (4th Cir. argued Dec. 7, 1989) (referral granted in some cases and denied in other); *Orr v. Sewell Plastics, Inc.*, No. 89-5108 (6th Cir. argued Nov. 13, 1989) (referral granted); *Orscheln Bros. Truck Lines v. Zenith Elec. Corp.*, No. 89-1329 (7th Cir. docketed Feb. 17, 1989) (referral denied); *West Coast Truck Lines v. Weyerhaeuser Co.*, No. 89-35115 (9th Cir. argued Oct. 3, 1989) (referral granted); and *Feldspar Trucking Co. v. Greater Atlanta Shippers Ass'n*, No. 89-8450 (11th Cir. docketed June 9, 1989) (referral denied).

frequency with which this issue is arising and the failure of the lower courts to agree, there is a need for clarification by this Court.

In our brief in *Supreme Beef Processors, Inc. v. Yaquinto*, No. 88-1958, filed at the Court's invitation, we noted that the Fifth Circuit's decision may furnish a less suitable vehicle for review because the record does not include the Commission's views on whether an unreasonable practice was in fact committed. U.S. Amicus Br. at 17. The instant petition, in contrast, affords a well-developed record and an expression of the ICC's views in a particular context. Consequently, in our view, the Court should grant review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1989
CERTIORARI GRANTED JANUARY 16, 1990

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39102

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Partial List of Appendices to Defendant's Brief in Support of Motion for Summary Judgment ...	JA-9
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SCHEDULE OF OMITTED MATERIAL

The following opinions, decisions and materials have been omitted in the printing of the Joint Appendix because they appear in the following pages in the Appendix to the printed Petition for Writ of Certiorari:

Opinion of the Court of Appeals, dated July 17, 1989 (879 F.2d 400 (8th Cir. 1989))	1a-13a
Memorandum, Orders, and Judgment of the District Court, dated July 22, 1988 (705 F.Supp. 1401 (W.D.Mo. 1988))	14a-27a
Decision of the Interstate Commerce Commission in No. MC-C-10961, Primary Steel, Inc. v. Maislin Industries, U.S., Inc., et al., served January 19, 1988	28a-44a

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

NO. 85-0021-CV-W-1

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Plaintiff,
v.
PRIMARY STEEL, INC.,
Defendant.

RELEVANT DOCKET ENTRIES

	<u>1985</u>
Complaint, filed.	January 8
Answer, filed.	March 27
Defendant's Motion to Refer Issues and Controversy to Interstate Commerce Commission with brief, filed.	April 2
Plaintiff's Opposition to motion to refer, filed.	May 3
Defendant's Reply to plaintiff's opposition to referral, filed.	July 31
Plaintiff's Motion with brief to supplement opposition to referral, filed.	August 1
Defendant's Reply to plaintiff's supple- mental brief in opposition to referral, filed.	August 12
Order entered staying proceeding and re- ferring issues to ICC.	September 3

1988

Defendant's Motion for Summary Judgment with brief and appendices including ICC record, filed.

April 8

Plaintiff's Cross Motion for Summary Judgment with brief, filed.

May 11

Defendant's Response and Brief in Opposition to plaintiff's cross motion for summary judgment, filed.

June 17

Defendant's Supplemental Brief in Opposition to plaintiff's cross motion for summary judgment, filed.

July 14

Memorandum, Order, and Judgment entered lifting stay, denying plaintiff's motion for summary judgment and granting summary judgment to defendant. (705 F.Supp. 1401 (W.D.Mo. 1988)).

July 22

Plaintiff's Notice of Appeal, filed.

August 19

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

—
NO. 88-2267 WM
—

MAISLIN INDUSTRIES, U.S., INC., *et al.*

v.

PRIMARY STEEL, INC.

RELEVANT DOCKET ENTRIES

1988

Appeal docketed.

August 25

Brief of Appellant, filed.

October 17

Addendum to Appellant's Brief, filed.

October 21

Brief of Appellee, filed.

November 18

Motion of Interstate Commerce Commission and United States to intervene with brief, filed.

November 21

Appellant's Opposition to intervention, filed.

November 25

Reply Brief of Appellant, filed.

December 5

1989

Order entered granting ICC leave to intervene and participate in oral argument.

January 3

JA-4

Oral argument held.

January 11

Opinion and Judgment entered affirming
district court judgment (879 F.2d 400
(8th Cir. 1989)).

July 17

JA-5

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

No. 85-0021-CV-W-1

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Plaintiff,

vs.

PRIMARY STEEL, INC.,
Defendant.

FILED
SEP 3 1985
R.F. Connor, Clk.
U.S. District Court
West District
of Missouri

ORDER

This case pends on defendant's motion to refer issues and controversy to the Interstate Commerce Commission (ICC) for determination. The plaintiffs filed their complaint on January 8, 1985 to collect the balance due on defendant's freight bills. Defendant filed an answer on March 27, 1985 raising thirteen defenses. Defendant filed a verified complaint with the ICC on March 22, 1985. The ICC proceeding has been stayed pending the ruling of defendant's motion to refer issues and controversy to the ICC filed April 2, 1985. The parties sought a stay of action in this Court until August 1, 1985 to allow the discussion and evaluation of settlement possibilities. Plaintiffs supplemented their opposition to the pending motion on August 1, 1985. Defendant replied to that supplementation on August 12, 1985. Discovery has been stayed to this

point and the motion is now in a posture for ruling. We have considered the suggestions filed in support of and in opposition to the motion. We conclude that the motion should be granted.

I.

A.

Defendants contend *inter alia* that the freight charges should be found inapplicable or unlawful because "(1) the freight rates and charges sought to be applied by [plaintiffs] are unreasonable, unlawful and unjust in violation of 49 U.S.C. § 10701(a); (2) the [plaintiffs'] practice of assessing and rebilling the [defendant] higher freight rates and charges than those originally quoted by [plaintiffs], agreed upon by the parties, confirmed in writing and billed by the [plaintiffs], constitutes an unreasonable, unlawful, unfair and deceptive practice in violation of 49 U.S.C. §§ 10701(a) and 10761; and (3) the tariff items containing the freight rates and charges sought to be assessed by the [plaintiffs] are not the applicable sections of the said tariffs, and the freight rates and charges in the said tariff sections, if applied, would violate 49 U.S.C. §§ 10761 and 10762 and the ICC's regulations thereunder." (Verified Complaint, p. 3). We conclude that these are issues more properly addressed by the ICC.

B.

The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. It comes into play when enforcement of a claim originally cognizable in the courts requires the resolution of issues which have been placed within the special competence of an administrative body. Judicial process should be suspended pending referral of those issues to the ad-

ministrative body for its views. *United States v. Western Pacific RR*, 352 U.S. 59, 63-64 (1956).

There are two factors in the principle: (1) uniformity and consistency in the regulation of businesses entrusted to a particular agency, and (2) utilization of an agency's specialized knowledge and insight gained through experience and more flexible procedures to ascertain or interpret the circumstances underlying legal issues. *United States v. Western Pacific*, *supra*, 352 U.S. at 64-65; *Nader v. Allegheny Airlines*, 426 U.S. 290, 303-304 (1976); *Iowa Beef Processors v. Illinois Central Gulf RR*, 685 F.2d 255, 259 (8th Cir. 1982).

The doctrine has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency and where the action turns on a determination of the reasonableness of a challenged practice. *Nader*, *supra*, 426 U.S. at 304-5. The doctrine requires the court to refer the matter to the ICC where "the claim presented to the court requires an inquiry into the lawfulness of a carrier's practice." *Iowa Beef Processors*, *supra*, 685 F.2d at 261.

II.

Plaintiffs have not designated which tariffs are applicable, but have stated the amount they assert is due. The defendant maintains that plaintiffs are applying an incorrect tariff. The ICC has the special competence and expertise to determine the appropriate tariffs to apply.

Defendant contends that if the plaintiffs have designated the appropriate tariff, it is unreasonable. The appropriate rate is a function of the reasons for the tariff as set by the ICC and whether they apply to the particular cargo. The ICC can order a waiver of the applicable tariff in a particular situation and yet maintain a consistent national practice without encouraging intentional discriminatory

rate "misquotes." See *Buckeye Cellulose Corp. v. Louisville & Nashville RR*, ICC Docket, No. 37635, decision served April 2, 1985. It is appropriate that we defer to the special expertise, competence, and administrative discretion possessed by the ICC.

The defendant challenges the practices of plaintiffs resulting in the alleged underpayment. It urges that the process be found to constitute an unreasonable, unlawful, and deceptive practice in violation of 49 U.S.C. § 10701(a) and 10761. There is an indication that the ICC is investigating similar complaints at present. See *Atlas Foundry & Machine Co. v. IML Freight, Inc.*, ICC Docket, No. MC-C-10942, decision served May 16, 1985. Such a policy decision should be dealt with uniformly and with reference to the underlying reasons and policies for the regulations. It is again appropriate that we defer to the expertise and administrative discretion possessed by the ICC.

Accordingly, it is

ORDERED (1) that the defendant's motion to refer issues and controversy to the Interstate Commerce Commission (ICC) for determination should be and is hereby granted. It is further

ORDERED (2) that the proceeding in this Court should be and is hereby stayed pending a final determination by the ICC. The Clerk shall remove this case from this Court's active docket until further order of Court.

/s/ John W. Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri
September 3, 1985

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 85-0021-CW-W-1

MAISLIN INDUSTRIES, U.S., Inc., et al.,
Debtor-In-Possession
Plaintiff

v.

PRIMARY STEEL, INC.,
Defendant

APPENDICES TO
BRIEF FOR DEFENDANT IN SUPPORT
OF DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT

Attached hereto are the Appendices referred to in the Brief For Defendant In Support Of Defendant's Motion For Summary Judgment.

Appendix

Title

* * *

3

*NITL-Petition To Institute Rulemaking On
Negotiated Motor Common Carrier Rates,
3 I.C.C.2d 99 (1986)*

* * *

Respectfully submitted,

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APPENDIX 3

EX PARTE NO. MC-177

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE— PETITION TO INSTITUTE RULEMAKING ON NEGOTIATED MOTOR COMMON CARRIER RATES

Decided October 14, 1986

The Commission has adopted a policy statement holding that, in the post-Motor Carrier Act of 1980 environment, the filed rate doctrine does not necessarily bar equitable defenses. Where an undercharge claim is filed by a carrier in court based on a tariff rate and the shipper claims that a lower, negotiated but unpublished rate was understood, if the court refers the case to the Commission for determination of the availability of equitable relief, the Commission will decide whether, under all the relevant circumstances, collection of the undercharges would be an unreasonable practice. A proposal to adopt a rule declaring a negotiated (but unpublished) motor carrier rate to be the maximum reasonable rate "if the shipper acted with a good faith belief that the negotiated rate was the legally applicable rate" is denied.

DECISION

BY THE COMMISSION:

BACKGROUND

Under 49 U.S.C. §10761(a), a motor common carrier must collect the rate published in its tariff. However, over the past few years, it appears that a significant number of motor common carriers have quoted lower rates that are not in the tariff and billed the shippers at those rates. Then, at a later date (often much later), the carrier or,

in many instances, the trustee in bankruptcy would bill the shipper for the difference between the tariff rate and the previously-agreed upon rate that had been paid. The justification given for this billing is that it is necessary to comply with section 10761. Obviously, the shippers believe that the carriers are treating them unfairly.

We issued an advance notice of proposed rulemaking (ANPR) [50 *Fed. Reg.* 37391 (1985)] in response to a petition filed by the National Industrial Transportation League (NITL). The ANPR invited public comment on a rule proposed by NITL¹ that would declare a negotiated (but unpublished) motor common carrier rate to be the maximum reasonable rate "if the shipper acted with a good faith belief that the negotiated rate was the legally applicable rate." Comments were requested on whether the Commission should adopt a rule similar to the one proposed by NITL or adopt a more appropriate alternative. Comments were also requested on whether the Commission has jurisdiction to adopt such a rule.

More than 100 separate comments were received.² Shippers, and shipper associations generally agree that quoting but not publishing rates is happening too often in the motor common carrier industry, and favor adoption of the rule proposed by NITL. Carriers, carrier associations, rate

¹ NITL's proposed rule states:

Where a motor common carrier and shipper have negotiated and agreed upon a specific rate for particular traffic, and the carrier has failed to file the rate in tariff form with the Commission, the negotiated rate is the maximum reasonable rate which may be charged by the carrier for all shipments which have been tendered by the shipper to the carrier to be transported under the negotiated rate if the shipper acted with a good faith belief that the negotiated rate was the legally applicable rate.

² On February 5, 1986, Cooper Industries, Inc. filed a motion to file comments out of time. Under 49 C.F.R. §1110.5, we will accept Cooper's comments.

bureaus, and several trustees in bankruptcy, among others, generally oppose any Commission action in this area. Some parties believe that, while a rule in this area is necessary, the rule proposed by NITL should not be adopted without change.

On May 8, 1986, we held an open voting conference on the NITL proposal. We voted to adopt a policy statement announcing that, in light of the Motor Carrier Act of 1980 the filed rate doctrine does not necessarily bar equitable defenses and advising that, if a case is referred to the Commission, we will decide if the collection of undercharges would be an unreasonable practice.

PRELIMINARY MATTER

On June 12, 1986, as supplemented July 7, 1986, Carrier Credit and Collection (CCC) filed a petition requesting reopening on the present record so that the Commission could reconsider, due to changed circumstances and material error, its decision to adopt the policy statement announced at the May 8, 1986 voting conference.³ CCC argues that the Commission's policy statement conflicts with the recent decisions in *Square D Co. v. Niagara Frontier Traffic Bureau*, 476 U.S. ____ (1986), (*Square D*)⁴ and *Regular Common Carrier Conference, et al, v. United States*,

³ By notice published at 50 *Fed. Reg.* 26956, (1986), the Commission granted a petition filed by the National Retail Merchants Association requesting an extension of time to reply to CCC's petition. Several replies to CCC's petition to reopen were filed.

⁴ The case involved a private antitrust action based on ICC filed tariff rates allegedly fixed pursuant to an agreement forbidden by the Sherman Act. The Court held that the carriers were not subject to treble damages liability. The Court affirmed the rule of *Keogh v. Chicago & Northwestern R-Co.*, 260 U.S. 156 (1922), which held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. It found that Congress, not the courts, was the appropriate body to change the law.

et al., 793 F.2d 376 (D.C. Cir. 1986)⁵ Because of the importance of the issues presented by CCC, pursuant to 49 C.F.R. §1110.5 we will treat CCC's petition and the replies thereto as late-filed comments, and consider them. However, as discussed below, neither *Square D* nor the *Regular Common Carrier* case preclude us from adopting this policy statement. Thus, CCC's petition to reopen is denied.

DISCUSSION AND CONCLUSIONS

Many of the parties question our authority to adopt the NITL's proposed rule. The carriers, carrier associations, and rate bureaus argue that the Commission may not adopt NITL's proposal because: (1) carrier rates must be on file to be valid under 49 U.S.C. §10762; and (2) the rule is tantamount to a class exemption from the requirement that common carriers charge only the rates contained in a tariff that is in effect, and thus would abrogate 49 U.S.C. §10761(a)⁶ and 11903 (which subject carriers and shippers to criminal sanctions for failure to observe the filed rate). These parties also contend that the proposal exceeds the Commission's authority over these claims, because the Commission lacks initial jurisdiction over rate reparation and collection actions and that, while a shipper might have a cause of action against an unreasonable or unlawful practice, the Commission has no authority to award damages. Only the courts can grant a remedy.

⁵ The court held there that a particular ("average rate") tariff did not produce a "filed rate" and thus did not comply with the requirement in Section 10761 that rates be "contained in a tariff." 793 F.2d at 379-380.

⁶ Section 10761(a) provides that:

Except as provided [in the Interstate Commerce Act] a carrier providing transportation * * * shall provide that transportation * * * only if the rate * * * is contained in a tariff that is in effect [under 49 U.S.C. 10761, *et seq.*] That carrier may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff * * *

Various shippers and shipper associations argue that 49 U.S.C. §10701(a),⁷ together with 49 U.S.C. §§10101(b), 10321, and 10704, form an adequate basis for the rule. They rely on the few rail cases where the Commission has recognized equitable defenses in tariff applicability cases, *e.g.*, *Buckeye Cellulose Corp. v. L & N R.R. Co.*, 1 I.C.C. 2d 767 (1985) (*Buckeye*), *aff'd. sub. nom.*, *Seaboard System R.R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986) (*Seaboard*). These parties contend that the rule would not abrogate section 10761 because tariff rates would still apply to the traffic they were intended to cover. Further, they stress that, although motor carrier undercharge cases must be filed in court, 49 U.S.C. §11706, the courts can refer the question of whether a motor carrier practice in fact violates the Act to the Commission, under the doctrine of primary jurisdiction.

We agree with the carrier interests that we lack authority to adopt the particular rule proposed by NITL. The proposed rule would abrogate the requirement in section 10761 that carriers charge only the tariff rate. While we have recognized equitable defenses to the application of tariff rates in appropriate cases such as *Buckeye*, adoption of NITL's rule would essentially nullify section 10761 whenever a shipper and motor common carrier negotiate rates.⁸ Under the proposal, the negotiated rate, rather than the tariff rate would apply *unless* the Commission determined that the shipper lacked a good faith belief that the negotiated rate was legally applicable. The rule is virtually a *per se* determination that, as a matter of law, the ne-

⁷ Section 10701(a) provides:

A rate (other than a rail rate), classification, rule or practice * * * provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission * * * must be reasonable.

⁸ Even the shippers favoring the NITL proposal characterize it as creating a rebuttable presumption that the negotiated rate would apply.

gotiated rate would apply and is, thus, in direct conflict with the statute.

In addition, as some parties point out, the Commission does not have jurisdiction over claims challenging the reasonableness of motor carrier rates charged in the past nor authority to order the waiver of undercharges. We address the question of what rates should have been charged by a carrier only in an advisory capacity upon referral from a court. For these reasons, we will not adopt NITL's proposal.

While we conclude that NITL's specific proposal conflicts with the requirements of section 10761 and the long-standing judicial construction of those requirements,⁹ the policy statement we adopt instead is both justified and within our jurisdiction. Contrary to the carriers' concerns about the NITL proposal, this policy statement does not abrogate Section 10761. *Seaboard, supra*, 794 F.2d at 638. See *Nepera Chemical, Inc. v. Sea-Land Service*, 794 F.2d 688, 693 (D.C. Cir. 1986). Rather, we emphasize that carriers must continue to charge the tariff rate, as provided in the statute. The issue here is simply whether we have the authority to consider all the circumstances surrounding an undercharge suit.

The recent *Seaboard* decision confirms that Section 10701(a) (which applies to motor as well as rail carriers) and Section 10704 gives us the authority to make this determination. Although Section 10761 requires that carriers must charge the tariff rate, "[t]he statute does not say what remedy is available if less than the tariff rate has in fact been charged and paid for past shipments" (emphasis added). *Seaboard* at 638. Moreover, while the

⁹ In the past, ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rate. See, e.g., *Southern Pacific Transp. Co., v. Commercial Metals*, 456 U.S. 336 (1982); *Louisville & Nashville v. Maxwell*, 237 U.S. 94, 97 (1915); *A. J. Poor, v. Chicago B.I.O.*, 12 I. C. C. 418 (1907).

Interstate Commerce Act still embodies the policy of non-discrimination, "[t]he primary authority to give effect to [that policy] * * * is reposed in the ICC." *Id.* In short, nothing prohibits us from reexamining the statute and announcing that, in the future, the tariff rate filed by motor carriers need not and should not be applied automatically in the limited circumstances covered by our policy statement.¹⁰

In particular circumstances it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim for undercharges.¹¹ In our view, the filed rate doctrine was not intended to condone or reward carriers in the circumstances involved here, especially where carrier actions may constitute fraudulent business practices.¹²

¹⁰ The courts consistently have recognized our authority to reinterpret the statute and "adapt [our] rules and practices to the nation's needs in a volatile changing economy." See, e.g., *American Trucking v. A.T.S.F.R. Co.*, 387 U.S. 397, 416 (1967); *Seaboard, supra*; *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) (en banc) cert. denied, 104 S. Ct. 2160 (1984); *Nueces County Navigation District No. 1 v. ICC*, 674 F.2d 1055 (5th Cir. 1982), cert. denied, 503 U.S. 206 (1983).

Similarly, our authority to address both equity and policy considerations in fashioning appropriate remedies has been recognized for years. See *ICC v. ATA*, 104 S. Ct. 2458 (1984); *Atchison, T.S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 823-24 (1973); *National Insulation Transp. Committee v. ICC*, 683 F.2d 533, 540-44 (D.C. Cir. 1982); *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981), cert. denied, 456 U.S. 905 (1982).

¹¹ We did not intend *Atlas Foundry & Machine Co. v. IML Freight, Inc.* (not printed), decided April 17, 1985, to be read as a wholesale refusal on our part to consider the situations involved here as unreasonable practices.

¹² The fact that the courts historically have refused to consider equitable defenses does not preclude our adopting this policy statement. *Seaboard, supra*, 794 F.2d at 638. As the court in *Seaboard* explained (*id.*), the courts have never held that the Commission lacks authority to prohibit the unreasonable collection of undercharges. Moreover, the Commission had not waived undercharges in the cases precluding equitable defenses.

Today's regulatory environment makes it appropriate for us to take a fresh look at the proper regulatory response to the matter of unfilled negotiated motor carrier rates. The principle that the charges contained in an applicable tariff must be assessed regardless of any agreement between shipper and carrier arose during an era of strict entry and rate regulation. Requiring strict adherence to the tariff rate was intended to avoid intentional carrier misquotation of rates as a means to offer secret discounts to particular shippers. See *Western Transp. Co. v. Wilson*, 682 F.2d 1227, 1230 (7th Cir. 1982). In the strict regulatory environment prior to the Motor Carrier Act of 1980, Pub. L. No. 96-296 (MCA), carriers did not enjoy the flexibility they now enjoy to negotiate particularized rate arrangements with shippers. Consequently, they charged essentially the same rates for freight in a given traffic lane, and it generally was not difficult to ascertain the published rate. In that regulatory climate shippers rarely were excused from paying the published rate.

In *Buckeye*, *supra*, we modified this strict tariff applicability standard for rail carriers because the deregulated pricing atmosphere created in the Staggers Act and the particular facts of the case led us to conclude that a more flexible approach was necessary—and that carriers were unlikely to use rate misquotations as a means to discriminate in favor of particular shippers today. We found there that the railroad had engaged in an unreasonable practice under 49 U.S.C. §§10701(a)(1) and 10704(a)(1) because the meaning of the published tariff was not plain to the ordinary user, the applicable rate was misquoted over a long period of time, and the shipper relied, in good faith, on the misquoted rate. In *Seaboard*, *supra*, 794 F.2d at 638, the reviewing court affirmed exercise of our unreasonable practices jurisdiction in this context. It found (*id.*):

The Interstate Commerce Act * * * still embodies the policies of nondiscrimination and uniformity. The primary authority to give effect to those pol-

icies, though, is reposed in the ICC. * * * The Commission in this case merely refused to allow the carrier to collect its undercharge when there was no evidence that the carrier intentionally or knowingly undercharged, when waiving the undercharges was unlikely to encourage carriers to indulge in intentional discriminatory rate misquotations, and when the shipper relied upon the carrier's continuing conduct in misleading the shipper as to the applicable rate under a confusing tariff. The Commission did not abolish the requirement of 49 U.S.C. §10761(a) that carriers must charge the tariff rate.

The policy statement we are here adopting will allow us to consider similar issues when raised by shippers using motor carriers. Indeed, as discussed below, this approach is even more compelling in the motor carrier area. Moreover, as we found in *Buckeye*, our former policy of penalizing shippers for carriers' mistakes regardless of the circumstances is unnecessary and inappropriate to deter discrimination under today's statutory scheme.

As noted earlier, the MCA dramatically altered the competitive atmosphere of the motor carrier industry. The relaxation of regulatory requirements and Commission oversight has resulted in intense, new competition. Thousands of carriers have entered the market with broad operating authority and increased pricing freedom. The new business atmosphere requires these carriers to price competitively and on extremely short notice if they are to retain existing traffic or quickly obtain new (including backhaul) traffic.

It is not entirely clear why the problem we are here addressing has developed. Some carriers argue that it is purely inadvertent that tariffs reflecting negotiated rates are not filed. Certain shippers believe the practice is intentional. Whatever the reason, the potential for this prob-

lem is significant. We are directed to encourage competitive, innovative, and individualized price and service options to meet changing market demand. 49 U.S.C. §10101(a)(2). As parties such as National Gypsum Co., et al. emphasize, hundreds, or even thousands, of individual motor common carrier rates are negotiated daily. In these circumstances, it can be extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file.

The question that we are addressing here is whether a shipper must pay the rate established in a tariff where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged (and therefore presumably filed as a tariff).¹³ We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach.

In our view, an inflexible policy frustrates the intent of the NTP to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers, and inhibit legitimate pricing initiatives. On the other hand, permitting equitable defenses in limited situations comports with the spirit of the MCA.

Furthermore, we are firmly convinced that our prior policy of applying Section 10761 strictly regardless of the circumstances is inappropriate and unnecessary to deter discrimination today. As the shippers point out, the variety of price and service options permitted under the MCA and

¹³ There is no comparable problem with rates negotiated with motor contract carriers because the rates do not have to be filed with the Commission in tariffs. *Exemption—MTR. Contr. Car.—Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd Central & Southern Motor Freight Association v. United States*, 757 F.2d 301 (D.C. Cir. 1985), *cert. denied*, 54 U.S.L.W. 3392 (1985).

NTP permit activity that previously would have been considered discriminatory. *E.g.*, *Rates for a Named Shipper*, 367 I.C.C. 959 (1984). Moreover, with the elimination of the prohibition against dual operations, a motor carrier not desiring to publish its rates can simply seek contract carrier authority. See *Exemption—MTR. Contr. Car.—Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd Central & Southern Motor Freight Association v. United States*, 757 F.2d 301 (D.C. Cir. 1985), *cert. denied*, 54 U.S.L.W. 3392 (1985). Thus, changed circumstances clearly warrant a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases. In short, as was the case in *Buckeye*, (see, *Seaboard*, *supra*, at 638): "the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers."

In response to carrier contentions that we are without jurisdiction to order waiver of motor carrier (as opposed to rail) undercharges, we now set out the rather limited nature of our role in motor carrier undercharge cases—and explain why it comports with the statutory scheme. As some parties point out, the Commission lacks initial jurisdiction to entertain challenges to the reasonableness of motor carrier rates charged in the past, or to order the waiver of undercharges. However, this does *not* mean that we lack authority to address the question of what rate should have been charged by a carrier (the tariff rate, the negotiated rate or some other rate) if the carrier brings an action for undercharges in district court, 49 U.S.C. §§11705(b)(3), 11706, and the court refers the question of whether the collection of undercharges would be an unreasonable practice to us under the doctrine of primary jurisdiction.¹⁴ *Seaboard*, *supra*, 794 F.2d at 638; *Great*

¹⁴ Recently, in its order of June 11, 1986 in No. 83 Civ. 2803 (RJW), *International Distribution Centers, Inc., v. Rhapsody Blouse and Sport-*

Northern Ry. v. Merchants Elevator, 259 U.S. 285, 291 (1927); *National Motor Freight Traffic Ass'n v. United States*, 268 F. Supp. 90, 92 (1967), *aff'd* 393 U.S. 18 (1968); *Western Transp. Co. v. Wilson*, *supra*, 682 F.2d at 1231-32. In the latter case, the Seventh Circuit held as pertinent here that we have authority to determine when motor carrier practices violate the Act, despite our inability to award reparations. In determining the question whether a motor carrier practice is unreasonable, the Commission will assume its traditional role in unreasonable practice cases, weighing the facts and circumstances in light of its experience and expertise, and aiding the court by making necessary administrative determinations. Consistent with the statutory scheme, the court retains its authority to set the remedy and accept or reject the Commission's conclusions.

In short, we offer to undertake an advisory analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts.¹⁵ We would, at a court's request, determine, based on all relevant circumstances, whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect. The referring court would retain final authority to set the remedy, if any, and review our determination. Accordingly, as the NITL and others contend, the instant policy statement is consistent with the statutory scheme.

swear, Inc., Defendant and Third Party Plaintiff, and Gerald W. Eskow, Third Party Defendant, the United States District Court for the Southern District of New York indicated that the Commission is not precluded from considering a shipper's equitable defenses in examining the question of whether a carrier's collection of undercharges is an unreasonable practice.

¹⁵ We note that we performed similar analyses pursuant to Ex Parte No. 358-F, *Change of Policy-Railroad Contract Rates*.

As previously indicated, CCC argues that the recent decisions in *Square D* and *RCCC*, reaffirm the validity of the filed rate doctrine and therefore refute the Commission's new policy. It believes we must, therefore, reverse the policy adopted at the May 8th open conference. We do not view our new policy—which of course is firmly supported by the recent *Seaboard* court case—as inconsistent with those decisions. Neither *Square D* nor *RCCC* involved the question of equitable defenses to a claim for undercharges, and neither decision indicates that the Commission is precluded from passing on the reasonableness of carrier practices pursuant to its express statutory authority in §10701(a). Further, as discussed earlier, we are not abolishing the requirements of §10761. Thus, the portions of *Square D* reaffirming that carriers must *file* their rates do not mean that we lack authority to find, in a particular case, that allowing a carrier to *collect* the tariff rate would be unreasonable.

In implementing this policy statement case-by-case, we will resolve what the tariff rate is and then analyze, under our practices jurisdiction, whether collection of the tariff rate is a reasonable practice. Indeed, the Commission also supports the view expressed by some parties that carriers who engage in illegal behavior by intentionally disregarding the tariff filing requirements should be properly dealt with under the antitrust laws, and/or other punitive statutes.¹⁶ See *Nepera Chemical*, *supra*, allowing a private damage action for negligence in applying for leave to refund and waive shipping charges where the carrier voluntarily represented that it would seek a specified rate correction. The Commission's intent in adopting this new policy is simply to make clear that the filed tariff rate need not and should not be applied automatically in the

¹⁶ In *Square D*, the Court made it clear that it was not holding the carriers harmless, but merely precluding a treble-damages antitrust action.

limited circumstances covered by our policy statement. Both the statute and the applicable case law permit us to take this action.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources. It is issued pursuant to 5 U.S.C. §553 and 49 U.S.C. §§10321, 10701(a), and 10704(b)(1).

It is ordered:

1. The petition filed on February 27, 1985, by the National Industrial Transportation League, is denied.
2. A policy statement, as described above, is adopted.
3. The petition to reopen filed by Carrier Credit and Collection is denied.
4. This proceeding is discontinued.
5. This decision is effective on November 29, 1986.

COMMISSIONER LAMBOLEY, commenting:

I support fully the concept that in the post-Motor Carrier Act of 1980 environment, the "filed-rate doctrine" does not necessarily bar equitable defenses. Indeed, our decision in No. 37635, *Buckeye Cellulose Corp. v. L & N R.R. Co.*, 1 I.C.C. 2d 767 (1985), *aff'd sub. nom.*, *Seaboard System R.R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986), recognized that the encouragement of market-based arrangements likewise requires us to consider the variety of situations that lead to new transportation price/service options.

In the course of negotiating and developing those new options there will be representations, inducements and reliance on the part of the respective parties. In this environment, there is reason to anticipate that certain problems of conduct and interpretation may arise, just as those which have prompted the general rule here requested by NITL.

Although our policy statement focuses on the questions framed by the petitions, the issues addressed here involve the broader elements of accountability, i.e., as people participate in the marketplace, their conduct may now be evaluated and potentially measured as to reasonableness of the practice.

In my view, this policy statement need not be confined to the case specific problems of negotiated rates and collection of undercharges in bankruptcy or other judicial settings. It likewise reaches the potential equitable considerations in various circumstances and the Commission's willingness to determine whether an unreasonable practice exists as a result of the relationship and conduct of the parties.

I do not believe court referral is an essential element to the exercise of our jurisdiction. In short, there is no reason in these cases to require referral before a party may petition for redress from alleged unreasonable practice(s). Cf. 49 U.S.C. §§11705(b)(3), 11706; *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparations*, 335 I.C.C. 403 (1969) (remedial focus on rates, reparations and waiver of undercharges.)

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Commissioner Lamboley commented with a separate expression.

(5)
No. 89-624

Supreme Court, U.S.

FILED

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JOSEPH F. SPANOL, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE PETITIONERS

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**PETITION FOR CERTIORARI FILED OCTOBER 16, 1989
CERTIORARI GRANTED JANUARY 16, 1990**

41 pp

QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its lawful tariff charges, does a shipper have a legal defense that it is entitled to a non-tariff rate which differs from the carrier's published rates filed with the Interstate Commerce Commission, where the ICC advises a court that collection of the applicable and lawful tariff charges would be unreasonable?

PARTIES TO THE PROCEEDING BELOW

Appellants in the court below were Maislin Industries, U.S., Inc., and its subsidiary operating companies, viz., Gateway Transportation, Inc., Quinn Freight Lines, Inc., Richmond Cartage Corporation, MI Acquisition Corporation, and Maislin Transport of Delaware, Inc.

Appellee in the court below was Primary Steel, Inc. The Interstate Commerce Commission was permitted to intervene as a party to the proceeding in support of appellee.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-624

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners.

v.

PRIMARY STEEL, INC.,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 879 F.2d 400 (1989). It appears in the Appendix to the Petition for Writ of Certiorari at 1a-13a.

The memorandum and order of the United States District Court for the Western District of Missouri is reported at 705 F.Supp. 1401 (1988). It appears in the Appendix to the Petition at 14a-27a.

The opinion of the Interstate Commerce Commission relied upon by the district court and court of

appeals was issued in Docket No. MC-C-10961, *Primary Steel, Inc. v. Maislin Industries, U.S., Inc.* Its unreported decision appears in the Appendix to the Petition at 28a-44a.

GROUND'S FOR THIS COURT'S JURISDICTION

The judgment of the court of appeals was entered on July 17, 1989, affirming the district court's judgment filed on July 22, 1988. No petitions for rehearing were filed. Pursuant to Section 1254(1) of Title 28 of the United States Code, the Petition for Writ of Certiorari was filed October 16, 1989, and certiorari was granted January 16, 1990.

STATUTES INVOLVED

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C. § 10701(a) provides in relevant part:

A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. § 10761(a) provides:

Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier

may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

STATEMENT OF THE CASE

This case arises from an action filed pursuant to 49 U.S.C. § 11706(a) to recover freight rate undercharges for interstate transportation services performed by Quinn Freight Lines, Inc., a subsidiary operating company of Maislin Industries, U.S., Inc. Quinn was a common carrier certificated by the ICC to engage in the transportation of property by motor vehicle in interstate and foreign commerce. Its rates, charges, rules, and regulations governing its services were maintained in published tariffs on file with the ICC. From January 1981 through mid-1983, Quinn transported 1,081 shipments for Primary Steel, Inc., a shipper of various steel products. Throughout this period, Quinn billed and Primary paid transportation charges which were less than the charges prescribed by Quinn's filed tariffs. (Pet. App. 29a-32a).¹

On July 14, 1983, Maislin Industries and its operating divisions filed petitions in bankruptcy. A post-petition audit of the debtors' accounts determined that Quinn had undercharged Primary by \$187,923.36 on the subject shipments. Thereafter, the duly appointed agents of the bankrupt estate acting pursuant to au-

¹ "Pet.App." refers to the appendices to the printed Petition for Writ of Certiorari filed October 16, 1989. "JA" refers to the printed Joint Appendix filed herewith.

thorization of the bankruptcy court issued balance due bills to the shipper for the undercharges representing the difference between the amounts previously billed and paid and the amounts prescribed by the tariffs on file with the ICC. Upon Primary's refusal to pay the amounts demanded, the Maislin estate brought suit in the district court to recover undercharges and prejudgment interest. Primary defended on the ground that no additional amounts were due because the parties had agreed to the charges already paid. It argued that even though the rates paid were not published in a tariff, it would be unreasonable to permit the collection of the higher filed tariff charges. At the shipper's request, the district court, by order filed September 3, 1985, stayed the proceeding and referred the matter to the ICC for a determination of (1) whether the asserted tariffs were applicable to the involved shipments, (2) whether the tariff rates were reasonable, and (3) whether assessing and re-billing for tariff rates higher than those agreed upon was an unreasonable practice. (JA 7, JA 8). The court noted that referral was appropriate because the ICC was considering adoption of a general policy addressing negotiated, unpublished rates. (JA 8).

While the referred administrative proceeding was pending, the ICC issued a policy statement in *Ex Parte No. MC-177, Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) (*Negotiated Rates*). (JA 11). That proceeding was instituted at the request of shipper associations whose members were receiving balance due bills from various bankrupt carrier estates for the payment of lawful but unpaid tariff charges. Following public comment, the ICC concluded that it could not lawfully adopt a rule declaring

an unfiled, negotiated rate the maximum that could be collected in undercharge litigation. (JA 15-JA 16). Nevertheless, it reasoned that the so-called filed rate doctrine had outlived its usefulness in the pro-competitive atmosphere brought about by the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793, July 1, 1980, and that the filed tariff concept should no longer preclude consideration of equitable defenses. (JA 19-JA 21). The Commission recognized, however, that it is without authority to waive motor carrier undercharges or, in the absence of court referral, entertain a proceeding involving rates on past shipments. (JA 16). Therefore, it offered to render advisory opinions to referring courts in which it would consider all the circumstances in a given case and advise the court whether an unfiled negotiated rate or the lawful tariff rate should apply. The Commission conceded that the referring court could accept or reject such opinions. (JA 22).²

The record before the ICC in the referred Primary proceeding was developed through the submission of written verified statements.³ On January 19, 1988, the ICC issued its opinion that the parties had negotiated a rate which although not published and filed with the ICC was the rate billed by Quinn and paid

² About two and one half years later, the ICC reversed its position and declared that its opinions are not advisory, but are final and binding on the courts. *Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989). This statement of self-anointed jurisdiction was not before the court below, but, in view of the court's conclusions, it would not have affected the outcome.

³ The administrative record was filed with the district court as part of defendant's motion for summary judgment and is contained in the record on appeal to the court below.

by Primary. (Pet.App. 36a-40a). It observed that although no showing had been made that Quinn intended to engage in unlawful conduct, it nevertheless failed to "legalize the quoted rates". (Pet.App. 42a). The Commission concluded that it would be an unreasonable practice to require payment of the lawful tariff charges. (Pet.App. 44a). The tariff rates were not determined to be inapplicable nor unreasonable although the parties submitted evidence on these issues. The failure to so rule was not challenged before the Commission or the referring court.

Ruling on cross-motions for summary judgment, the district court found that the ICC determination was a matter within its primary jurisdiction and entitled to deference. (Pet.App. 17a-19a). Concluding that the ICC's recognition of equitable defenses was consistent with the law and its findings were supported by substantial evidence, the court affirmed the ICC determination that collection of the tariff charges would be an unreasonable practice. (Pet.App. 25a). In light of these conclusions, the district court did not address Maislin's request for prejudgment interest. Judgment was entered for Primary. (Pet.App. 27a).

On August 19, 1988, Maislin filed its notice of appeal. The ICC was permitted to intervene in support of defendant and the case was duly briefed, argued and submitted for decision to a three judge panel. On July 17, 1989, the court issued its opinion affirming the judgment and conclusions of the district court that the issue considered is within the ICC's primary jurisdiction (Pet.App. 5a-7a) and that equitable defenses may be properly considered. (Pet.App. 9a-11a). The court found it unnecessary to address

Maislin's request for prejudgment interest. (Pet.App. 12a-13a).

SUMMARY OF ARGUMENT

Since its inception the Interstate Commerce Act has required that common carriers collect and shippers pay only the filed tariff rate. This Court has repeatedly held that the overriding purpose of the Act could not be achieved if carriers and shippers could secretly agree to rates different from those contained in a tariff. As a result, both intentional and mistaken departures from the filed rate have been strictly prohibited as a defense in actions to recover common carrier tariff charges. To ensure the integrity of its regulatory scheme, Congress imposed civil and criminal penalties on carriers and shippers for failure to adhere to the published tariff. The Act's punitive and remedial provisions are deliberate in design to compensate the public injury for departures from lawful rates. Manifestly, a private remedy having the effect of supplanting a lawful, effective tariff with a non-tariff rate would completely undo the statute.

The facts of this case do not differ in substance from those in which the courts have repeatedly held that the statute absolutely bars equitable claims or defenses based on so-called negotiated rates. The difference here is that the ICC, the agency charged with enforcing the Act, has declared that the tariff adherence requirements of the statute are unreasonable where the parties have negotiated a rate in conflict with the tariff. However, the filed rate doctrine is a creature of statute, not ICC policy, and Congress has not given the Commission or the courts discretion in

relieving motor common carriers and shippers from these requirements.

The court of appeals recognized that courts cannot give legal effect to an illegal rate. Nonetheless, it attempted to create a remedy by resorting to the doctrine of primary jurisdiction under which only the ICC may determine the reasonableness of a carrier practice, and impermissibly allowed that determination to give rise to an equitable defense. This Court has held, however, that primary jurisdiction cannot be employed to create a legal remedy where none exists. The ICC has no authority to waive motor carrier undercharges on the basis of a practice or otherwise and the statute precludes the courts from recognizing equitable defenses to their collection. Yet, acting in concert, the court of appeals and the ICC accomplished a result which neither could bring about independently.

The unambiguous language of the Act does not authorize a statutory remedy which entitles a shipper to enforce a non-tariff rate. In view of the Act's various provisions dependent on the filed rate doctrine, any claim to a rate other than the filed rate is absolutely inconsistent with the statute.

Congress has provided a comprehensive scheme of rate regulation and has seen fit in limited and narrow circumstances to specifically define instances where the filed rate provisions are not applicable. By the same token, the tariff adherence requirements of the statute have not been changed in relevant part, even after Congress' thorough review preceding enactment of the Motor Carrier Act of 1980. To infer an intent to eliminate such a requirement is to ignore the plain

language of the statute. If a change is to be made, it must come from Congress.

ARGUMENT

A. The Filed Rate Doctrine Precludes Recognition Of Non-Tariff Rates As A Matter Of Law

The issue presented and the pertinent facts are relatively simple. The current undercharge litigation involves the following common facts: an incorrect billing by the carrier at below tariff rates resulting from an agreement of the parties or an erroneous rate quotation by the carrier, the failure to publish and file those rates with the ICC, and the subsequent rebilling, typically by a bankrupt estate, at the applicable tariff rate.⁴ Simply put, the question is whether the shipper has a legal right to the non-tariff rate.

The touchstone of the controversy lies in 49 U.S.C. § 10761(a), which, like its predecessor sections, require that common carriers collect and shippers pay only the filed tariff rate. This mandate forms the basis of the filed rate doctrine. In *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the Court held that the Interstate Commerce Act extinguished any common law right to a reasonable rate and substituted therefor a right to whatever rate was duly filed with the ICC, unless that rate is determined to be unreasonable or discriminatory. The Act's fundamental nondiscriminatory purposes could not be achieved absent tariff filing and adherence require-

⁴ It is more than coincidental that carriers such as Quinn who were willing to offer deep discounts from their tariff rates are no longer operating.

ments. As explained in *Armour Packing Co. v. United States*, 209 U.S. 56, 28 S.Ct. 428, 435 (1908), "If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart."

Equitable defenses to collection of the filed tariff rate such as here involved are of necessity barred by the statute. Thus, in *Louisville & N. R. R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 495 (1915), the Court stated:

Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

The harsh realities of this doctrine have been repeated by the Court on numerous occasions since that time⁵ and through its most recent pronouncement in

⁵ See, e.g., *Louisville & N.R.R. v. Central Iron & Coal*, 265 U.S. 59, 65 (1924); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-5 (1939); *Southern Pacific Transportation Co., Inc. v. Commercial Metals Co.*, 456 U.S. 336, 343-4 (1982); and *Thur-*

1986 in *Square D Company v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), where the Court, quoting from Justice Brandeis' opinion in *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922), held:

Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. [citations omitted]. 476 U.S. 416-417.

The tariff rates involved here were not found to be unreasonable and therefore are "the duly submitted, lawful rates under the Interstate Commerce Act. . . ." *Id.*, 476 U.S. at 417.

The tariff filing and adherence requirements are "utterly central" to the Act. *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). They are the linchpin of federal rate regulation without which much of the remainder of the Act would be unenforceable and unnecessary. There would, for example, be no way to enforce the requirement that rates be just and reasonable, 49 U.S.C. § 10701(a), or the prohibition against discrimination, 49 U.S.C. § 10741(b). The penal provisions of 49 U.S.C. §§ 11902 and 11903 (formerly the Elkins Act, 49 U.S.C. § 41), 11904 and 11916 would be nul-

ston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983).

lified. The basis for the antitrust immunity afforded by 49 U.S.C. § 10706(b) authorizing motor common carriers to collectively formulate and maintain published rates would be nonexistent. Shippers could not challenge rates before they became effective, 49 U.S.C. § 10708(a)(1), or after, 49 U.S.C. §§ 10704(b), 11705(b)(3), and could not recover an overcharge, 49 U.S.C. § 11705(b)(1).

It is thus apparent that the Act is intentional in design in prohibiting exceptions to the filed rate doctrine. In the absence of a specific exception, the statute cannot be construed to simultaneously require the filing of rates in a tariff, while condoning noncompliance with that requirement.

B. The ICC Opinion Does Not Make Viable A Statutory Equitable Defense

To avoid *Maxwell* and its progeny, the court of appeals engaged in a procedural improvisation. Cognizant that courts may not recognize equitable defenses, *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986), the court resorted instead to the doctrine of primary jurisdiction to circumvent this prohibition. Finding that the ICC has primary jurisdiction to determine the reasonableness of carrier practices under 49 U.S.C. § 10701(a), the court employed that determination to excuse the requirements of Section 10761(a). However, proper resolution of the issue presented does not require resort to this doctrine at all. The question does not involve whether the ICC has jurisdiction to determine the unreasonableness of a practice.⁶ Rather, the threshold question

⁶ The asserted "practice" is the enforcement of a lawful tariff,

is whether there exists a legally cognizable right to a non-tariff rate. If the remedy does not exist, primary jurisdiction cannot be implicated to create one.

The effect of the concerted actions of the court and the ICC was to create a remedy where none independently exists in either the courts or the ICC. This procedural device was held to be impermissible in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) and *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). *Montana-Dakota* was a suit in a federal court by Montana, a purchaser of electricity from Northwestern, at rates filed with the Federal Power Commission under the Federal Power Act. The gravamen of the complaint was that the rates violated the Act in that they were unreasonably high, that Northwestern had misled the FPC into accepting the rates, that the rates had therefore been improperly established, and that Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect. Applying the filed rate doctrine, the Court held that the complaint failed to state a cause of action, for the reason that one "can claim no rate as a legal right that is other than the filed rate, . . . and not even a court can authorize com-

a statutory mandate which the ICC has no jurisdiction to declare unlawful. The use of the phrase "carrier practice" has been cleverly employed by shippers and the ICC to call into play primary jurisdiction because it is a term used in the statute. Mere labelling conduct as a practice does not bring it within agency primary jurisdiction. *Nader v. Allegheny Airlines*, 426 U.S. 290, 304 (1976) (doctrine is appropriate where there is "a question of the validity of a rate or practice included in a tariff filed with an agency"). (Emphasis supplied).

merce in the commodity on other terms." 341 U.S. at 251.

Dealing with a dissenting opinion that the issue of rate reasonableness could be referred to the FPC, the Court noted that referral of particular issues to an administrative agency might be appropriate where the plaintiff "concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary." 341 U.S. at 253. However, under the filed rate doctrine a plaintiff has no cause of action for damages grounded on a claim that he has a right to a rate other than the filed rate. Hence, Montana's claim that, but for the fraud alleged, it would have paid a lower rate failed to state a cause of action.

In *T.I.M.E.*, motor carriers sued the United States, *qua* shipper, to collect freight charges. The government defended on the ground that the rates upon which they were computed were unjust and unreasonable. The district court granted summary judgment to the carriers, but the court of appeals reversed on the ground that the government was entitled to an ICC determination of the reasonableness of the tariff rates, notwithstanding the ICC's inability to award reparations on motor carrier rates for past shipments. Relying on *Montana-Dakota*, the Court reversed, holding that the Motor Carrier Act did not "give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert 'unreasonableness' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

As here, it was asserted that a statutory cause of action or defense existed by virtue of the language in former Section 216(b) of the Act (the predecessor

to present Section 10701(a)) requiring that rates, and, as here pertinent, practices be reasonable. The Court held, however, that the statutory duty to establish and observe reasonable rates and practices creates only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right." 359 U.S. at 469. Thus, the general requirement imposed on carriers to observe reasonable practices under Section 10701(a) does not provide shippers a cause of action or defense for a violation of that duty.

The Court also addressed the contention that the Motor Carrier Act preserved a pre-existing common law right to a reasonable rate. Relying on *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, *supra*, it concluded that under the statutory scheme only the ICC could determine the reasonableness of a rate and therefore any common law right was necessarily extinguished as "absolutely inconsistent" with the statute. 359 U.S. at 473. Nevertheless, the government urged that such a remedy would be consistent with the statute when coupled with referral to the ICC for a determination of the reasonableness issue as an adjunct to a judicial proceeding. The Court rejected this contention stating:

To permit a utilization of the procedure here sought by the Government would be to engage in the very "improvisation" against which this Court cautioned in *Montana-Dakota*, *supra*, in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly. In the absence of the clearest indication that Congress intended that the Mo-

tor Carrier Act should preserve rights which could be vindicated only by such an improvisation, we must decline to consider a defense which involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide. * * * * [footnote and citation omitted]. 359 U.S. at 475.

Even assuming ICC primary jurisdiction over the practices asserted here, the Commission is without independent authority to waive motor carrier undercharges or the requirements of Section 10761(a), and the courts may not declare unreasonable the enforcement of the tariff on the basis of negotiated unfiled rates. The combined rulings below achieve precisely this forbidden result.

Nevertheless, the court believed support for its rationale existed in *Seaboard System R. R., Inc., supra*. (Pet.App. 8a). However, it failed to recognize critical jurisdictional differences which render *Seaboard* inapposite. At issue in *Seaboard* was an ICC decision⁷ ordering the waiver of railroad undercharges subsequent to and independently of the rail carrier's civil action to recover tariff undercharges. While the suit was pending, the shipper filed an administrative complaint for a formal determination by the ICC that no undercharges were due in view of the confusing nature of two different lawfully filed tariff provisions. In this posture, the subtle but substantive statutory jurisdictional distinctions between ICC rail and motor carrier rate regulation become apparent.

⁷ *Buckeye Cellulose Corp. v. Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985).

Rail carriers are liable for damages resulting from acts or omissions in violation of the Act. 49 U.S.C. § 11705(b)(2). Liability may be enforced by court action or filing a complaint with the ICC. 49 U.S.C. § 11705(c)(1). The Commission may order a rail carrier to pay damages, 49 U.S.C. § 11705(c)(2), which order is enforceable by a private civil action. 49 U.S.C. § 11705(d)(1). The Commission may also order the carrier to stop a violation. 49 U.S.C. § 10704(a)(1). Thus, the ICC order under review in *Seaboard* was issued pursuant to specific statutory powers and was self executing. The Commission's independent jurisdiction to order waiver of undercharges was not in question. Rather, the reviewing court was called upon to determine whether the order was contrary to law.⁸

In contrast, the ICC has no similar authority over motor carrier rates on past shipments. Jurisdiction is vested exclusively in the courts. 49 U.S.C. § 11706. Of course, Section 10701(a) confers no enforcement power. Assuming, *arguendo*, the involvement of motor carrier practices, the ICC's authority is found in 49 U.S.C. § 10704(b)(1),⁹ which is limited to future prescription. Therefore, while the ICC may order a motor carrier to publish and charge its tariff rates in the future, it cannot waive collection of tariff charges

⁸ In *Seaboard* both the ICC and court decisions were couched in terms of the Commission's authority over unreasonable practices. However, the ultimate issue involved the applicability of tariff provisions lawfully on file. It did not concern an unfiled rate. *Seaboard* is therefore factually distinguishable as well.

⁹ In purporting to uphold the ICC's practices jurisdiction over motor carriers, the court of appeals erroneously relied on Section 10704(a)(1), which is limited in its application to rail, rail-water, express, and pipeline carrier transportation. (Pet.App. 3a).

accrued in the past. Unlike the order in *Seaboard*, the ICC's unreasonable practice finding here was not enforceable. For that matter, the ICC's opinion is simultaneously superfluous and beyond its jurisdiction. By the same token, the Act gives the Commission no power to waive or declare unreasonable the requirements of Section 10761(a). The Commission's findings therefore have no substantive effect.

C. The Statutory Reparations Remedy Did Not Create An Equitable Defense

The holding in *T.I.M.E.* left purchasers of motor common carriage without any remedy whatever with respect to unreasonable rates on past shipments. Three years later, the Court explained that ruling in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), holding that a shipper's common law damage claim for a motor carrier's misrouting practice was not extinguished by the Act. In that case, a shipper filed a civil action to recover the difference in rate charges resulting from the carrier's routing of intrastate shipments over its interstate routes at higher rates than those applicable to its intrastate routes. The action was stayed and the ICC subsequently determined that such routing was unjustified and unreasonable.¹⁰ The district court dismissed the complaint on the basis of *T.I.M.E.*, and the court of appeals affirmed. This Court reversed and held that such action was not extinguished because the remedy sought was consistent with the statutory scheme.

In distinguishing *T.I.M.E.*, the Court emphasized that the focal issue was "not one of rates but of

¹⁰ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 302 I.C.C. 173 (1957).

routes." 371 U.S. at 87. Indeed, no challenge was made against either of the carrier's admittedly lawful tariffs. The Court concluded that a misrouting remedy was not repugnant to the statutory scheme because, unlike rates, the statute did not preempt rights and liabilities with respect to motor carrier routing. Thus, the Court observed that the Act did not afford shippers a right to select routes, and did not provide procedures to challenge routing practices in advance of shipment. *Id.* at 87. Moreover, the absence of a judicial remedy placed the shipper entirely at the mercy of the carrier contrary to the overriding purposes of the Act. *Id.* at 88. Critical to the Court's conclusion was its determination that allowance of a remedy for misrouting, unlike a remedy for rate reasonableness, would not jeopardize the stability of tariffs or of certificated routes or otherwise hamper efficient administration of the Act. *Id.* *Hewitt-Robins*, therefore, neither narrowed nor altered the ruling in *T.I.M.E.*

Following the Court's decisions, various legislative proposals were introduced in the 87th, 88th and 89th Congresses to provide a statutory remedy for the situations addressed in *T.I.M.E.* and *Hewitt-Robins*. Congress responded with the enactment of Pub.L. 89-170, 79 Stat. 651, September 6, 1965. That legislation created the rate reasonableness remedy found lacking in *T.I.M.E.*, but declined to adopt a *Hewitt-Robins* type remedy for other violations of the Act. The law amended then Section 204a of the Act to provide a cause of action against motor carriers for the recovery of "reparations", defined as "damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as pro-

vided in Section 216(e) of this part, . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." Former Section 204a(2) and (5).¹¹

The statute unambiguously limits the recovery of reparations to proceedings in which the ICC finds the rates contained in a tariff to be unlawful under prescribed statutory criteria. The recodified language of Section 11705(b)(3) omits the reparations definition, but likewise limits the remedy to the "imposition of rates . . . the Commission finds to be in violation of [the Interstate Commerce Act]." This narrow remedy does not provide a cause of action or defense for other statutory violations. In this context, the Motor Carrier Act is in stark contrast with the provisions of the Act dealing with rail and water carriers (former Parts I and III, respectively) which impose liability for damages resulting from "an act or omission of that carrier in violation of [the Act]." 49 U.S.C. § 11705(b)(2). The distinction is critical. As the Court observed in *T.I.M.E.*:

To hold that the Motor Carrier Act nevertheless gives shippers a right of reparation

¹¹ The Interstate Commerce Act was recodified in 1978. See Pub. L. 95-473, 92 Stat. 1337, October 17, 1978. The pertinent provisions of former Section 204a, 49 U.S.C. § 304a, now appear in 49 U.S.C. § 11705(b)(3) and § 11706(c)(2). The recodification effected no change in substance and none was intended. See House Report No. 95-1395, dated July 26, 1978, at pages 8, 9, reprinted in 1978 U.S. Code Cong. & Admin. News, pp. 3016-3018. Examination of the prior language is required to determine the intent of Congress. *Trailer Marine Transport Corp. v. Federal Maritime Commission*, 602 F.2d 379, at 383, n. 18 (D.C. Cir. 1979).

with respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act. 359 U.S. at 471.

The plain language of the statute establishes that the reparations remedy against motor carriers is much narrower than that available against rail and water carriers. Cf. *Seaboard*, *supra*.

The legislative history of Pub.L. 89-170 confirms that this distinction in treatment was intentional. While Congress had several bills before it¹² covering similar subject matter, it is important to contrast H.R. 5401 which became law with H.R. 5869 which did not. The latter bill was favored by shippers, the government, and the ICC and would have amended Section 204a(a) to provide:

In case any common carrier by motor vehicle subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such carrier shall be liable to the person or persons injured thereby for

¹² H.R. 5250, H.R. 5396, H.R. 5398, H.R. 5869, H.R. 5401, and S. 1727, S. 1732.

the full amount of damages sustained in consequence of any such violation¹³

Congress was well aware that H.R. 5401 provided a substantially narrower remedy than that proposed by H.R. 5869. Nevertheless, as stated in the House Report on H.R. 5401, "[t]he committee further resolved the suggestions as to reparations by adopting sections 6 and 7 of H.R. 5401 rather than the provisions of H.R. 5869."¹⁴

Both the Commission and the government favored adoption of H.R. 5869 to make uniform the remedies against all carriers regulated by the Act.¹⁵ Both also acknowledged the distinctions between the proposed and enacted bills. Thus, in commenting on the difference in S. 1727 (the counterpart to H.R. 5401) and S. 1732 (the counterpart to H.R. 5869), the United States Comptroller General stated:

We note that the provisions in S. 1727 are considerably abbreviated as compared to those in S. 1732, a bill which proposes detailed and specific provisions to permit the recovery of damages for violations of parts II and IV; S. 1727 defines "reparations" and authorizes recovery of such reparations rather than "damages" for violations, as in related sections of the Interstate Commerce

¹³ Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5401, 89th Cong., 1st Sess., at page 14 (March 23-25, 1965).

¹⁴ House Report, (Interstate and Foreign Commerce Committee), No. 253, April 22, 1965, reprinted in 1965 U.S. Code Cong. & Admin. News, p. 2927.

¹⁵ *Id.*, pp. 2936-2941.

Act covering rail and water carriers. Our support for S. 1732 is reflected in our letter to you on April 22, 1965, B-120670.

The ICC likewise later explained that it would have preferred equal treatment of all modes of transportation. Addressing its limited jurisdiction in motor carrier reparations matters under the 1965 law, it observed, "[w]hile in the opinion of the Commission uniformity with respect to procedure for handling reparations under parts I, II, III, and IV of the act would have been desirable, Congress elected to provide otherwise." *Informal Procedure for Determining Reparation*, 335 I.C.C. 403, 413 (1969).

The letter and intent of the reparations remedy provided by Pub. L. 89-170 was plainly limited to actions for unreasonable rates and specifically excluded actions for other violations of the Act. As stated in the House Report, the legislation "would restore a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case . . . and would not affect in any way the right of shippers to recover damages for misrouting under the Hewitt-Robins doctrine" (Emphasis added; citations omitted).¹⁶ *T.I.M.E.* therefore continues to stand for the proposition that the Act does not provide a defense to recovery of the lawful rate on the ground that the carrier violated its duty to observe reasonable practices.

The ICC's unreasonable practice finding was not the equivalent of a determination that Quinn's tariff rates were unreasonable which the Commission de-

¹⁶ See House Rep. No. 253, reprinted in 1965 U.S. Code Cong. & Admin. News, p. 2931.

clined to make. The zone of rate reasonableness for motor carriers is governed by the statutory criteria set forth in Section 10701(e) of the Act. A filed rate not found unreasonable is the legal and lawful rate. That another rate may exist, albeit negotiated and illegal, which the ICC finds applicable is not determinative of whether the filed rate is within the zone of reasonableness.¹⁷ In essence, the Commission found that an applicable, effective, and lawful rate cannot be collected. Such a finding has no statutory source.

D. A Remedy Giving Effect To Negotiated Rates Is Absolutely Inconsistent With The Statute

A remaining consideration is whether the equitable negotiated rates defense to the application of filed rates can exist outside of but consistent with the Act as in *Hewitt-Robbins, supra*. Whether such a claim survived enactment of the Motor Carrier Act depends on the effect of the exercise of the remedy upon the statutory scheme of regulation. 371 U.S. 89.

¹⁷ Compare *Ia. Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), upholding the ICC's prescription of a rate that was the same as a negotiated contract rate. In the Commission proceeding the carrier's costs and other factors, including the agreed rates, were considered in assessing the reasonableness of the proposed rail rate before it became effective in a filed tariff. On the weight to be given the negotiated contract rate, the ICC said "... once a tariff becomes legally effective, the shipper has no judicial or other remedy for the carrier's repudiation of its [contract rate] agreement, even if the shipper substantially relied on it." *Unit Train Rates on Coal-Burlington Northern, Inc.*, 364 I.C.C. 186, 197 (1980). Of further note is the fact that the contract rate had been filed and permitted to become effective pending the Commission's investigation of the proposed rate. *Id.* at 191.

There can be no serious question that a claim to a rate other than the filed rate is absolutely inconsistent with and necessarily extinguished by the statute. *Texas v. Abilene Cotton, supra*. Recognition of such a defense would render the rate provisions of the Act a nullity and destroy the entire purpose served by the maintenance and filing of tariffs. For this reason, resort to Section 10701(a) of the Act to negate the requirements of Section 10761(a) would impermissibly permit the Act to destroy itself. *Texas v. Abilene Cotton, supra*.

Unlike the circumstances of *Hewitt-Robbins*, the Act gives shippers pre-shipment protections to verify that a quoted rate is, in fact, a legal rate. Tariffs are public documents and are available for inspection at the offices of the Commission and the carrier. 49 U.S.C. § 10762. Moreover, during the time period in question, carriers could only change rates by publication on 30 days' notice. 49 U.S.C. § 10762(c)(3).¹⁸ Primary Steel had ample time to ensure that the rates quoted to it by Quinn were legal. Shippers likewise have the post-shipment reparations remedy to challenge the lawfulness of a filed tariff rate. In addition, the ICC has broad enforcement powers over motor carriers to compel compliance with their tariffs, 49 U.S.C. §§ 11701, 11702, and the government may proceed civilly and criminally against carriers and shippers for failing to adhere to tariffs. 49 U.S.C. §§ 11902-11904. Finally, and not to dismiss the obvious, a carrier that does not file a negotiated rate

¹⁸ The ICC subsequently reduced this period in *Short Notice Effectiveness for Independently Filed Rates*, 1 I.C.C.2d 146 (1984), affirmed *sub nom. Southern Motor Carriers Rate Conference v. U.S.*, 773 F.2d 1561 (11th Cir. 1985).

has no legal remedy to recover it. Conversely, a shipper has no legal right to enforce it.

The additional remedy created by the court below is neither authorized nor necessary. In contrast to the objectives of *Hewitt-Robins*, such a result would encourage additional violations by reducing the incentive to file tariffs and negating the shipper's obligation to ascertain whether the rate is on file.

E. No Relevant Statutory Change Permits Equitable Defenses

The Motor Carrier Act of 1980 did not alter the requirements of Section 10761(a) or make any other relevant statutory change warranting departure from *Maxwell*. Nevertheless, in upholding the ICC's "reinterpretation" of the filed rate doctrine, the court of appeals relied on the general pro-competitive thrust of the reform legislation. (Pet.App. 12a).

The general purpose of the 1980 Act is insufficient to overcome the strict requirements and harsh results of the filed rate doctrine. As stated in *Square D*, *supra*, "... harmony with a general legislative purpose is inadequate for that formidable task." 476 U.S. at 420. If the reasons underlying the filed rate doctrine are no longer sound, it is up to the Congress to change that policy.¹⁹

This pronouncement takes on particular importance where, as here, Congress has carefully re-examined

¹⁹ In fact, legislation has been proposed to accomplish precisely the result reached below. See H.R. 3243 introduced September 12, 1989, by the Chairman of the House Committee on Public Works and Transportation which oversees the ICC and its administration of the Interstate Commerce Act. A similar bill in the last Congress died before action could be taken.

the law and provided a specific statutory framework under which shippers and carriers can conduct business. For example, the 1980 legislation relaxed entry requirements, 49 U.S.C. § 10922; broadened the sphere of contract carriage, 49 U.S.C. § 10923; allowed motor carriers to operate as both common and contract carriers without prior approval of their dual status, 49 U.S.C. § 10930(a); created a zone of rate freedom to allow carriers to raise and lower rates without ICC interference, 49 U.S.C. § 10703; enabled carriers to establish rates based on limited liability without prior ICC approval, 49 U.S.C. § 10730(b); and authorized continued antitrust immunity for collective ratemaking by motor common carriers, 49 U.S.C. § 10706(b).

The Commission has implemented the Act to provide carriers with greater flexibility within a regulated environment. It relieved motor contract carriers, on an industrywide basis from rate filing requirements;²⁰ allowed motor contract carriers to obtain permits to serve entire classes of unnamed shippers;²¹ actively encouraged the discounting practices of motor common carriers;²² and adopted a general rule allowing motor common carriers to respond quickly

²⁰ *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150 (1983), affirmed *sub nom. Central & Southern Motor Freight Tariff Assn. v. United States*, 757 F.2d 301 (D.C. Cir. 1985).

²¹ *Issuance of Permits Authorizing Industrywide Service*, 133 M.C.C. 298 (1983), appeal dismissed in *American Trucking Associations, Inc. v. United States*, 747 F.2d 787 (D.C. Cir. 1984).

²² *Lawfulness of Volume Discount Rates, Motor Common Carriers*, 365 I.C.C. 711 (1982).

to market demand by individually filing reduced rates on one day's notice.²³

Congress has provided the regulatory framework within which to achieve the goals of the national transportation policy. 49 U.S.C. § 10101. It did not, however, evince an intent to permit motor common carriers, shippers, or the ICC to subvert the statutory tariff adherence requirements. Significantly, continued adherence to the filed rate doctrine in no way infringes on the many reforms enacted.²⁴ Had Congress desired to carve exceptions into or eliminate these requirements, it would have done so. For example, the ICC may relieve motor contract carriers from rate filing requirements, 49 U.S.C. § 10761(b).²⁵ This is a plain indication that Congress never intended to authorize the Commission to relieve motor common carriers from the Act's tariff filing requirements. *Regular Common Carrier Conference, supra*. 793 F.2d at 379. Similarly, in the 1980 Household Goods Transportation Act, Pub.L. 96-454, 94 Stat. 2011, October 15, 1980, Congress authorized motor common carriers of household goods to quote binding

²³ *Short Notice Effectiveness for Independently Filed Rates, supra*.

²⁴ The harmony between the filed rate doctrine and the 1980 reforms is illustrated by Congress' treatment of owner-operators engaged in food transportation. While Congress substantially eased their licensing requirements, 49 U.S.C. §§ 10922(b)(4)(E) and 10923(b)(5), it explicitly required that their rates be filed. 49 U.S.C. § 10762(g).

²⁵ Section 10761(b) existed prior to 1980, but was not implemented by the ICC to apply to all motor contract carriers until after the 1980 Act. *Exemption of Motor Contract Carriers from Tariff Filing Requirements, supra*.

estimates of charges pursuant to specific statutory and regulatory procedures. 49 U.S.C. § 10735(a)(1).²⁶ Common carriers may also transport property for federal, state, or local governments without charge or at reduced rates (which must be filed with the ICC either before or after shipment). 49 U.S.C. § 10721. Motor carriers may also provide transportation of recyclable materials without charge or at a reduced rate. 49 U.S.C. § 10733.

In view of the overriding legislative purpose served by filed rates, it cannot be claimed that Congress overlooked the requirements of Section 10761(a) when it enacted the Motor Carrier Act of 1980.²⁷ Congress has defined specific and limited circumstances in which the filed rate doctrine is not applicable. The decision below renders these provisions superfluous. To infer an intent to eradicate the filed rate doctrine is to ignore the plain language of the statute.

ICC implementation of its *Negotiated Rates* Policy is an attempt to accomplish that which Congress has declined. In every negotiated rates case considered, the Commission has found that collection of the lawful tariff charge is unreasonable where a negotiated, unfiled rate exists. Ironically, in *Negotiated Rates*, the Commission declared that it could not lawfully adopt a general rule giving effect to unfiled negotiated rates.

²⁶ Initially codified at 49 U.S.C. § 10734 and renumbered to present section by Pub.L. 98-554, 98 Stat. 2852, October 30, 1984.

²⁷ In fact, it carved a specific exception into section 10761 with the addition of subsection (c) excluding business entertainment expenses as defined in 49 U.S.C. § 10751 from computation of a carrier's cost of service or rate base.

(JA 15). Its chosen course of doing so on a case-by-case basis is a flagrant attempt to circumvent the law.

The ICC Policy as implemented by the court of appeals turns the statute on its head. The circumstances giving rise to this and similar litigation are neither novel nor beyond the contemplation of the Act.²⁸ In its wisdom, Congress has provided a vast arsenal of remedies to uphold the integrity of filed rates to protect the public interest, and punish both shippers and carriers who attempt to circumvent the system. In view of this explicit statutory structure, it cannot be seriously argued that the statute likewise permits a shipper to retain the benefit of a rate declared by the same statute to be illegal. Nor can it be argued that it is inequitable to require a shipper to pay the lawful tariff charge. To the contrary, it is unfair to the remainder of the shipping public which pays lawful tariff rates and effectively subsidizes the beneficiaries of individual rate agreements. The dilemma now faced by recipients of secret rate agreements results from their own lack of diligence and ICC failure to enforce the rate provisions of the stat-

²⁸ The ICC policy statement has spawned widespread conflict among the federal courts. (Pet.App.45a-53a). Since the filing of the petition for certiorari, the Ninth Circuit reached the same conclusion as the court below in *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016 (1990). By order filed February 16, 1990, it stayed the issuance of its mandate pending resolution of this case. The Second Circuit issued a decision holding that referral is appropriate, but did not reach the effect to be given an ICC finding of unreasonableness. No. 88-9057, *Delta Traffic Services, Inc. v. Appco Paper & Plastics Corp.*, decided January 4, 1990, suggestion for rehearing *en banc* filed January 18, 1990.

ute. The ICC *Negotiated Rates* Policy compounds and memorializes those omissions and, in the process, administratively nullifies the statutory requirement that common carrier rates be contained in a tariff.

CONCLUSION

The issue presented in this case is answered by the plain language of the statute as construed by the Court for over eight decades. If there is to be a change in the law, it is a task for Congress.

The court of appeals' decision is erroneous as a matter of law. Petitioners respectfully request that the judgment be reversed and the cause be remanded with directions that it be remanded to the district court for entry of judgment in favor of Maislin and instructions to rule on the request of prejudgment interest.

Respectfully submitted,

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**IN THE
Supreme Court of the United States**

October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL.,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF FOR RESPONDENT

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**COUNTERSTATEMENT OF QUESTION
PRESENTED FOR REVIEW**

Whether the Interstate Commerce Commission, in exercising its primary jurisdiction under 49 U.S.C. §10701(a), may determine that it is an unreasonable practice for a motor carrier to collect higher charges from a shipper after negotiating the originally charged rate and representing to the shipper that the negotiated rate was properly published with the Interstate Commerce Commission, and whether such a determination by the Interstate Commerce Commission may be relied upon by a court.

PARTIES TO THE PROCEEDING BELOW

Appellants in the United States Court of Appeals for the Eighth Circuit, and Petitioners herein, are Maislin Industries, U.S., Inc., and its subsidiary operating companies, viz., Gateway Transportation, Inc., Quinn Freight Lines, Inc., Richmond Cartage Corporation, MI Acquisition Corporation, and Maislin Transport of Delaware, Inc.

Appellee in the United States Court of Appeals for the Eighth Circuit, and Respondent herein, is Primary Steel, Inc.* The Interstate Commerce Commission was permitted to intervene as a party to the proceeding below in support of the Appellee.

* The parent companies of Primary Steel, Inc. are International Affiliates & Partners; Golodetz Corporation; Golodetz Trading Corp.; and Primary Industries Corporation.

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IN THE
Supreme Court of the United States

October Term, 1989

No. 89-624

MAISLIN INDUSTRIES, U.S., INC., *ET AL.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 879 F.2d 400 (8th Cir. 1989), and is reprinted as Appendix A (1a-13a) to the Petition For Writ of Certiorari.

The memorandum and order of the United States District Court for the Western District of Missouri, Western Division, granting summary judgment for the Respondent is reported at 705 F.Supp. 1401 (W.D. Mo. 1988), and is reprinted as Appendix B (14a-27a) to the Petition For Writ Of Certiorari.

The opinion of the Interstate Commerce Commission relied upon by the District Court and the Court of Appeals was served on January 19, 1988 at *Primary Steel, Inc. v. Maislin Industries, U.S., Inc., et al.*, Docket No. MC-C-10961. The opinion is unreported, and is reprinted as Appendix C (28a-44a) to the Petition For Writ Of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief For The Petitioner.

STATUTES INVOLVED

49 U.S.C. §10701 Standards For Rates, Classifications, Through Routes, Rules, And Practices

(a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable

49 U.S.C. §10761 Transportation Prohibited Without Tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

COUNTERSTATEMENT OF THE CASE

This proceeding was instituted on January 8, 1985 by the filing of a complaint with the United States District Court for the Western District of Missouri, Western Division, by Maislin Industries, U.S., Inc. ("Maislin"). Also named as plaintiffs in the complaint were Quinn Freight Lines, Inc. ("Quinn"); Gateway Transportation Co., Inc.; Richmond Cartage Corporation; and Maislin Transport of Delaware, Inc., each of which were divisions or subsidiaries of Maislin and were interstate common carriers of property under certificates issued by the Interstate Commerce Commission ("ICC"). Maislin and its divisions or subsidiaries are debtor and debtor-in-possession in Chapter 11 bankruptcy proceedings pending in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division. (Pet. App. 28a)¹

The complaint alleged that Primary Steel, Inc. ("Primary") underpaid Maislin for 1,081 of Primary's shipments of steel products transported by Maislin's division or subsidiary, Quinn, during the period of January, 1981 through November, 1983, by the sum of \$187,923.36, plus interest and costs.² Maislin's claim for undercharges was based on its contention that despite the fact that Primary had, prior to the bankruptcy, timely paid all charges billed to it at rates agreed upon by the parties, those rates were inapplicable under tariffs filed with the ICC pursuant to 49 U.S.C. §10761(a). Thus, the claimed undercharges represented the difference

¹ "Pet. App." refers to the appendices to the printed Petition For Writ Of Certiorari filed by the Petitioners on October 16, 1989. "JA" refers to the printed Joint Appendix filed herewith. "R" refers to the Joint Appendix containing the record filed with the Court of Appeals. "Pet. Brief" refers to the Brief For The Petitioner.

² References to the carrier that transported the shipments will be "Maislin", "Quinn/Maislin" or "Quinn", as appropriate.

between the rates negotiated by the parties and paid by Primary, and the tariff rates assessed by Maislin two or more years after the shipments took place. (Pet. App. 30a)

On March 22, 1985, pursuant to 49 C.F.R. §1111.1, *et seq.*, Primary instituted a formal complaint proceeding before the ICC at Docket No. MC-C-10961 alleging, *inter alia*, that the rates sought to be applied to the 1,081 shipments by Maislin were unreasonable, unlawful and unjust, in violation of 49 U.S.C. §10701(a), and that Maislin's practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed constituted an unreasonable, unlawful, unfair and deceptive practice in violation of 49 U.S.C. §10701(a). (Pet. App. 33a)

Primary then filed a motion on April 2, 1985 with the District Court requesting that under the doctrine of "primary jurisdiction" the proceeding be referred to the ICC for a determination of the reasonableness and applicability of Maislin's tariffs, and the assessed freight rates and practices thereunder, at issue in the complaint. Maislin opposed the motion arguing that the equitable defenses raised by Primary were invalid as a matter of law, and referral to the ICC would serve no useful purpose.

The District Court, by order entered on September 3, 1985, granted Primary's motion and ordered that the issues and controversy raised in the complaint be referred to the ICC for determination. The referral was grounded on the application of the doctrine of primary jurisdiction, and the determination by the District Court that the reasonableness of Maislin's billing practice of assessing and rebilling higher rates than those originally quoted and billed was the particular type of controversy that should be resolved by the application of the ICC's special competence, expertise and administrative discretion. (JA 5-8)

The ICC served its decision on January 19, 1988, and relying on its earlier decision in *National Industrial Transportation League-Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*Negotiated Rates I*"), concluded that it would be an unreasonable practice under 49 U.S.C. §§10701(a) and 10761(a) to require Primary to pay the claimed undercharges. (Pet. App. 43a-44a) *Negotiated Rates I* was a rulemaking proceeding wherein the ICC adopted a policy statement holding that in the highly competitive environment following the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, July 1, 1980, which amended the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.*, under certain circumstances the filed rate doctrine does not prohibit the assertion of equitable defenses.³

In applying *Negotiated Rates I*, the ICC made extensive factual findings that Maislin's division or subsidiary, Quinn, over a continuing period of time offered Primary transportation at various quoted rates which Primary accepted; that based on Quinn's representations Primary reasonably relied on Quinn to publish the quoted rates with the ICC pursuant to 49 U.S.C. §10761(a); that Quinn's failure to properly publish the quoted and agreed upon rates in tariffs, should under the circumstances, preclude Quinn's later collection of undercharges; that there was no evidence that Primary agreed to pay more than the amount Quinn originally quoted and billed for each shipment; that there was no evidence that Quinn even demanded additional amounts

³ The ICC in a later decision in *National Industrial Transportation League-Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (served June 29, 1989) ("*Negotiated Rates II*"), supplemented the earlier decision and reiterated that the rate filing requirements under 49 U.S.C. §10761(a) remain in effect but also held that the assessment of such rates may be found to be an unreasonable practice under appropriate circumstances. *Id.* at 627, 631.

over the amounts billed at any time during the business relationship with Primary; that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services performed; and that the amounts were reached as the result of negotiation between the parties, and because full payment was made by Primary, Quinn was equitably entitled to collect no further charges from Primary. (Pet. App. 36a-43a) Because of the finding of an unreasonable practice in violation of 49 U.S.C. §10701(a), the ICC did not address the reasonableness of the higher rate levels claimed by Maislin.

Subsequently, Primary moved for summary judgment requesting that the District Court afford substantial deference to, and affirm, the ICC's decision. (R 30a-32a) Maislin also moved for summary judgment contending that the ICC's decision was merely an advisory opinion and was contrary to law. (R 469a-472a) The District Court, by memorandum and order filed on July 22, 1988, granted summary judgment for Primary concluding that the ICC's determinations that a negotiated rate existed and that the collection of the undercharges would be an unreasonable and unlawful practice, were supported by substantial evidence and should be affirmed. (Pet. App. 25a)

On August 19, 1988, Maislin filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit ("Court of Appeals"). The ICC, upon motion, was permitted to intervene in support of Primary. Following the submission of briefs and oral argument, on July 17, 1989 the Court of Appeals issued an opinion affirming the judgment and conclusions of the District Court.

In the opinion, the Court of Appeals determined that referral of the proceeding by the District Court to the ICC was correct, and that the issue of the reasonableness of Maislin's billing practices was within the ICC's

primary jurisdiction. (Pet. App. 5a-7a) Finding that nothing prohibits the ICC from changing its policy on enforcing the unreasonable practices provision of 49 U.S.C. §10701(a), the Court of Appeals concluded that the ICC's change in policy and consideration of equitable defenses was justified and consistent with its "practices" jurisdiction under the Interstate Commerce Act. (Pet. App. 7a-9a) The Court of Appeals also found that the ICC's consideration of equitable defenses⁴ was a reasonable attempt to harmonize the competing provisions of 49 U.S.C. §10701(a), which mandates that tariff rates and practices be reasonable, with the provisions of 49 U.S.C. §10761(a), which mandates the collection of tariff rates. (Pet. App. 9a) The Court of Appeals also disregarded Maislin's argument that the ICC's decision was merely an "advisory" decision, finding that the ICC had recognized that its responsibility was to evaluate the reasonableness of a practice, while the District Court retained the authority to structure a proper remedy. (Pet. App. 12a) Lastly, the Court of Appeals determined that Maislin's claim for prejudgment interest was not required to be addressed, because Primary was not liable for the claimed undercharges. (Pet. App. 12a-13a)

⁴ In *Negotiated Rates II*, the ICC clarified its previous position in *Negotiated Rates I*, stating that "[w]hile our unreasonable practice rules are 'equitable' in the sense that they are intended to result in decisions that are fair to the parties, they are based upon the legal requirements of §10701" 5 I.C.C.2d at 628, n. 11.

SUMMARY OF ARGUMENT

At issue in the proceeding before the Court of Appeals was whether Maislin's billing practice of assessing and rebilling higher rates than those originally quoted to secure Primary's business, and confirmed and billed to Primary, and which were assessed approximately two years after the last such shipment, was reasonable and enforceable. The Court of Appeals correctly affirmed the District Court's referral of the issue to the ICC, under the doctrine of primary jurisdiction, for the determination of the reasonableness of Maislin's billing practice pursuant to 49 U.S.C. §10701(a). The District Court's referral has been the traditional method utilized by courts for the determination of such issues arising under 49 U.S.C. §10701(a).

The Court of Appeals also correctly affirmed the District Court's adoption of the ICC's decision determining that it would be an unreasonable practice pursuant to 49 U.S.C. §10701(a) to require Primary to pay the claimed undercharges (representing the difference between the rates negotiated by the parties and the tariff rates). The ICC, in exercising upon referral its special competence, expertise, and administrative discretion, and acting within its primary jurisdiction, provided a reasoned and correct statutory construction of 49 U.S.C. §§10701(a) and 10761(a). The ICC's statutory construction also provided a reasonable accommodation between competing sections of the Interstate Commerce Act. Lastly, the Court of Appeals did not commit error in finding that the District Court properly accorded substantial deference to the ICC's decision. Thus, the decision of the Court of Appeals is fully consistent with established federal law and should be affirmed in its entirety.

ARGUMENT

1. The Court Of Appeals Correctly Found That Equitable Defenses Can Be Considered Pursuant To 49 U.S.C. §10701(a) To Determine The Reasonableness Of A Motor Common Carrier's Billing Practices.

Maislin's principal argument is that the Court of Appeals committed error by disregarding past precedents in affirming the District Court's acceptance of the ICC's determination that Primary is permitted to raise equitable defenses to the application of the filed rate doctrine, where Primary reasonably relied on Maislin's rate quotes and its assurances that lawful tariffs had been filed. (Pet. Brief 9-12)¹ The Court of Appeals thoroughly reviewed the precedents and the pertinent provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. §10101, *et seq.*, and correctly rejected this same argument, by concluding that the decision on referral demonstrated the ICC's continuing evolution of its view on the relevance of negotiated rates in determining the reasonableness of a motor common carrier's billing practices under 49 U.S.C. §10701(a). (Pet. App. 7a-11a)

A. The Interstate Commerce Commission Proceeding.

The ICC, upon referral by the District Court, considered the issues of whether Maislin's widespread practice of assessing and rebilling higher rates than those originally quoted to secure Primary's business, and confirmed and billed to Primary, constituted an unreasonable practice in violation of 49 U.S.C. §10701(a), and whether the filed rate doctrine barred the consideration of that equitable defense against Maislin's claim for undercharges.

¹ The filed rate doctrine refers to the requirement of 49 U.S.C. §10761(a) that a motor common carrier must collect the rate published in the tariff.

In considering these issues the ICC exhaustively reviewed the evidence submitted by the parties.⁶ The evidence showed that employees or agents of Quinn/Maislin, as an inducement to secure the substantial business of Primary, orally quoted to Primary rates for the transportation of the shipments of steel products at issue. These quoted rates were discussed by the parties at various times, in personal visits and in telephone calls, throughout the period of 1979 through 1983. Following the completion of the negotiations between the parties, the quoted rates were accepted by Primary, and confirmed in writing by Quinn. Primary was subsequently billed by Quinn and paid in full to Quinn, for the shipments at the agreed upon rates. (R 141a-144a; 153a-157a)⁷

Maislin had contended in the evidence submitted to the ICC that Primary owed the amount of \$187,923.36, plus interest and costs, for the shipments, alleging that the higher rates assessed were those filed in tariffs with the ICC during the time period of the shipments. Maislin also contended that the rates quoted by Quinn and agreed to by the parties were irrelevant because those rates had not been properly filed by Quinn in tariffs with the ICC. (R 306a-316a)

In response, Primary requested that the ICC find payment of the alleged undercharges unreasonable, because Primary in good faith relied upon the representations of Quinn's employees or agents and believed that Quinn would do whatever was necessary to comply with the ICC's rules as to rate tariff publication. Also based on the representations of Quinn's employees

⁶ The Court of Appeals noted that the parties did not challenge the ICC's findings of fact. (Pet. App. 12a)

⁷ Primary has already billed its customers based in part upon the transportation costs, and has no way to recoup additional compensation from its customers to pay the undercharges. (R 138a, 403a)

or agents, Primary utilized Quinn instead of other motor carriers available (at the same or similar rates) for the shipments. (R 141a-144a; 153a-157a)⁸

After reviewing the evidence, the ICC determined that negotiated rates existed for the shipments at issue.

It is clear that negotiations took place between Primary, represented either by Mr. Costello or by another person on his staff, and Quinn, represented by Mr. McGowan, prior to movement of the shipments in question. Further, there is evidence of offers, acceptances, and approvals by the involved parties. (Pet. App. 36a)

The ICC further determined that there was a reasonable basis for Primary to rely on the representations made by Quinn's representatives.⁹

⁸ During the period of the shipments at issue, Pittsburgh & New England Trucking Co. ("P&NE"), a competitor of Quinn, maintained comparable rates filed in tariffs with the ICC. Primary could have continued to use P&NE to secure the same rates as those quoted, confirmed and billed by Quinn. (R 169a) As a result, Primary received no rate advantage or preference by using Quinn, because the rates were offered by other carriers and were readily available to all similarly situated shippers. See, e.g., *Thermofil, Inc. v. Jones Transfer Company*, 355 I.C.C. 828 (1977).

⁹ Maislin contends that the ICA gives shippers pre-shipment protections to verify that a quoted rate is, in fact, a legal rate, including the availability of tariffs for inspection at the offices of the ICC. (Pet. Brief 25) The record shows that this contention has no merit. The evidence submitted by Primary's expert witness, David W. Donley, demonstrated that had Primary attempted to inspect and review the pertinent tariffs prior to moving the shipments under the quoted rates, Primary would have been faced with an extremely complex and convoluted scheme of overlapping and superceding tariff publications, including various class rate bureau tariffs and 57 separate commodity rate publications. In fact, it would have been virtually impossible for Primary to verify with legal certainty that the particular rates quoted by Quinn/Maislin had been filed with the ICC. (R 167a-168a; 420a-421a)

(Footnote continued on following page.)

The evidence of record shows that Mr. McGowan negotiated on behalf of Quinn and offered Primary rates that were approved in each instance by Mr. Pardus, Quinn's director of rates. Primary's Mr. Costello understood that all rates offered to Primary were approved by Quinn's Adamsburg office. Further, a written rate sheet that confirmed these rates was given to Primary. In these circumstances, we conclude that Primary could legitimately rely on representations made by a carrier's local agent and approved by the carrier's director of rates. Clearly, the quoted rates were established by individuals whose positions and actions reasonably induced the shipper's reliance on the arrangement. [footnote omitted] (Pet. App. 40a)

The ICC also determined that Quinn's practice of soliciting traffic by the use of negotiated rates was a widespread practice.

... Maislin's use of local, commissioned agents to obtain traffic was apparently a widespread practice. In other similar proceedings before the Commission involving Maislin, over 40 shippers, and many thousands of shipments, [footnote omitted] the evidence shows that it was Maislin's practice to use local agents to solicit traffic for the Maislin carriers and negotiate rates, subject to approval from Maislin management. (Pet. App. 41a)

(Footnote continued from preceding page.)

In addressing this issue, the ICC concluded that Primary's lack of knowledge of tariff filing requirements did not negate the existence of a negotiated rate, nor did it preclude the ICC from applying the policy announced in *Negotiated Rates I*. (Pet. App. 42a-43a)

In *Negotiated Rates II*, the ICC specifically noted that "[h]undreds, or even thousands, of individual motor common carrier rates are now negotiated daily. Moreover, reduced tariff rates may now be filed to become effective on one day's notice. [footnote omitted] In these circumstances, it would be extremely difficult for shippers to determine, prior to an initial movement, whether the agreed-upon rate is actually on file (or what rates their competitors are paying)." *Id.* at 633.

In finding that pursuant to 49 U.S.C. §10701(a) Maislin was not legally permitted to collect the alleged undercharges of \$187,923.26 (the difference between the negotiated rates and the tariff rates), the ICC concluded:

The evidence, then, discloses that, over a continuing period of time, Quinn offered Primary transportation at the involved rates and that Primary accepted those offers. Primary relied on Quinn to implement properly the quoted rates. Quinn's failure to do so, despite Primary's lack of vigilance, should, in these circumstances, preclude Quinn's later collection of undercharges. There is absolutely no evidence that complainant agreed to pay any more than the amount defendant originally quoted and billed for each shipment. There is no evidence that Quinn ever demanded additional amounts over the amounts it billed at any time during its business relationship with Primary. We find that Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Primary and Quinn, and that, since full payment was made by complainant, defendant is equitably entitled to collect no more. (Pet. App. 43a)

Relying on *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986), and its decision in *Negotiated Rates I*,¹⁰ the ICC concluded that the filed rate doctrine did not bar the consideration by the ICC of equitable defenses against Maislin's claim for undercharges. The ICC further found that Maislin's billing practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed to Primary, constituted an unreasonable practice in violation of 49 U.S.C. §10701(a), as follows:

... (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom [Primary] legitimately could rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the rate quotation.

... In light of our conclusion that negotiated rates existed, we find that it would be an unreasonable practice now to require Primary to pay undercharges for the difference between the negotiated rates and the tariff rates. (Pet. App. 43a-44a)

¹⁰ In *Negotiated Rates I* and *Negotiated Rates II*, the ICC declared that it would find the application of filed rates unreasonable when the shipper and the carrier have engaged in "... a course of conduct consisting of: (1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates." *Negotiated Rates II*, 5 I.C.C.2d 628, n. 11. The findings of the ICC, and the record supporting the findings, clearly demonstrated that Maislin's practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed to Primary, constituted an unreasonable practice.

B. The Interstate Commerce Commission's Determination That Equitable Defenses Can Be Considered Pursuant To 49 U.S.C. §10701(a) In Determining The Validity Of Undercharges Was Fully Supported By Precedent.

The ICA requires that a motor common carrier collect the rate published in its tariffs. See 49 U.S.C. §10761(a). The traditional view has been that rates agreed to by the parties were not particularly relevant in determining the reasonableness of rates. Moreover, ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rate. See, e.g., *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97, 35 S.Ct. 494, 495 (1915). The filed rate doctrine was strictly enforced to prevent intentional misquotations or secret discounts to carriers seeking to discriminate in favor of particular shippers. *Western Transp. Co. v. Wilson and Co., Inc.*, 682 F.2d 1227, 1230-31 (7th Cir. 1982); *Negotiated Rates I*, 3 I.C.C.2d at 106 (JA 21).

In recent years the ICC has reexamined the issue. In *Buckeye Cellulose Corp. v. Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985), *aff'd sub nom.*, *Seaboard System R.R. Co. v. United States*, 794 F.2d 635 (11th Cir. 1986), the Eleventh Circuit affirmed the ICC's decision to order the waiver of undercharges pursuant to 49 U.S.C. §§10701(a) and 10704(a)(1) based on a rail carrier's rate misquotation. The case arose from a proceeding before the ICC where the shipper contended that the railroad intentionally misquoted a rate to the shipper, and that the attempt by the railroad to collect resultant undercharges from the shipper was an unreasonable practice. The ICC specifically found that the shipper did not pay the applicable tariff rate, but determined that under the circumstances presented the collection of undercharges in itself was an unreasonable practice. The ICC also reversed its prior position that the equitable defense of a carrier rate misquotation was not a defense to a claim for undercharges by a carrier. The

Eleventh Circuit found that the ICC was "...both justified and within its jurisdiction", and that "[n]othing prohibits the ICC from changing its policy on enforcing the 'unreasonable practice' provision of section 10701(a)". *Id.* at 638.

Subsequently, the ICC in *Negotiated Rates I* adopted a policy statement providing that the filed rate doctrine does not necessarily bar the consideration by the ICC of equitable defenses against claims for undercharges. The ICC noted in the decision that the passage of the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793, July 1, 1980, had "dramatically altered the competitive atmosphere of the motor carrier industry", resulted in "intense, new competition," and required "carriers to price competitively and on extremely short notice" in order to retain or obtain new traffic. *Id.* at 105 (JA 19). As a result, the ICC found that shippers are required to daily negotiate "hundreds, or even thousands" of individual rates, and it is "extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file". *Id.* at 105 (JA 20).¹¹ The issue, as summarized by the ICC, was:

... whether a shipper must pay the rate established in a tariff where a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged (and therefore presumably filed as a tariff). [footnote omitted] We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates

¹¹ In the ICC's later decision in *Negotiated Rates II*, the ICC explained the magnitude of the increase in competition resulting from the passage of the MCA. In 1979, there were approximately 17,000 regulated motor common carriers. Due to relaxed entry requirements resulting from the MCA, the number of regulated motor common carriers had increased in 1989 to more than 39,000. Thus, as noted by the ICC, "...today, shippers do not depend upon regulation to protect them from discriminatory pricing; in most circumstances, there are simply more competitive options." *Id.* at 632.

should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach. *Id.* at 105-06 (JA 20).

Concluding that permitting equitable defenses comports with the spirit of the MCA, the ICC stated that upon referral from a court it would decide whether, under all "relevant circumstances", the collection of undercharges would be an unreasonable practice. *Id.* at 107 (JA 22).¹²

The ICC's establishment in *Negotiated Rates I* of a new procedure for determining the reasonableness of a motor common carrier's billing practices pursuant to 49 U.S.C. §10701(a), was not an attempt by the ICC to change or eliminate the filed rate doctrine embodied in 49 U.S.C. §10761(a). In fact, the ICC has always had the jurisdiction to address the question of the unreasonable collection of undercharges; *Negotiated Rates I* was merely a further step in the continuing evolution of the ICC's view of the relevance of negotiated rates in determining the reasonableness of a motor common carrier's billing practices. *Negotiated Rates I*, 3 I.C.C.2d at 106-107 (JA 21-22).

¹² Maislin, citing *Negotiated Rates I*, 3 I.C.C.2d at 107 (JA 22), argues that the ICC's decision in this proceeding was merely "advisory" in nature and the District Court was not required to follow the ICC's decision. (Pet. Brief 18) The Court of Appeals, in dismissing this issue, stated that "[v]iewed in context, the ICC simply recognized the allocation of responsibility between it and the courts, and that after it evaluates the reasonableness of a practice, the courts retain authority to structure a proper remedy. Maislin's semantic argument is not persuasive to us. See *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202, 205 (1960) (ICC decision finding rates unreasonable was "by no means a mere 'advisory option'")." (Pet. App. 12a) In *Negotiated Rates II*, the ICC clarified its previous position and stated that negotiated rate determinations are not advisory opinions, but result in "binding and dispositive" orders. *Id.* at 624.

In past instances, the ICC and the courts have recognized that the harsh realities of the filed rate doctrine can be ameliorated by equitable considerations. For example, the ICC has permitted deviations from tariff provisions where a notation required to be placed on shipping documents by the tariff had no bearing on the nature of the commodity or the service performed. See, e.g., *Standard Brands, Inc. v. Central R.R. of N.J.*, 350 I.C.C. 555, 558-59 (1974). Similarly, the ICC has found that enforcing a notation provision required by a tariff, thereby rendering inapplicable a lower (commodity) rate in favor of a higher (class) rate, would result in an unreasonable practice in violation of 49 U.S.C. §10701(a). See, e.g., *Carriers Traffic Serv. v. Anderson, Clayton & Co.*, 881 F.2d 475, 483 (7th Cir. 1989). See also *Seaboard System R.R., Inc. v. United States*, 794 F.2d at 638 (ICC refused to enforce a railroad's tariff rate in circumstances where the shipper had relied on the carrier's representation that a significantly lower rate would apply to its transportation).

Recently, the Ninth Circuit in *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir. 1990), relying in part on the Court of Appeals' decision in this proceeding, affirmed the ICC's decision on referral that the collection of undercharges by a bankrupt motor carrier, under a billing collection scheme similar to the Maislin practice, was an unreasonable practice pursuant to 49 U.S.C. §10701(a).¹³ See also *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989), a case involving a similar factual situation as this proceeding and argued before the Eighth Circuit on the same day as this proceeding. The District Court had referred the proceeding to the ICC, but citing the filed rate doctrine

¹³ By order filed February 16, 1990, the Ninth Circuit stayed the issuance of its mandate pending the resolution of this proceeding.

refused to affirm the ICC's decision that the collection of undercharges was an unreasonable practice. The Eighth Circuit, relying on the decision in this proceeding, reversed the District Court and held that the reasonableness of the carrier's billing practice was within the primary jurisdiction of the ICC, and that the District Court should have deferred to the ICC's decision. *Id.* at 548.¹⁴

Lastly, Maislin argues that *Louisville & Nashville R.R. Co. v. Maxwell*, *supra* and *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922 (1986), reaffirmed the validity of the filed rate doctrine by prohibiting any deviation from the terms of a filed tariff. (Pet. Brief 11) The Court of Appeals considered this argument and properly found that Maislin's reliance on those decisions was untenable.¹⁵

¹⁴ In *Matter of Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), rehearing denied March 1, 1989, petition for writ of certiorari pending in No. 88-1958, *sub nom.*, *Supreme Beef Processors, Inc. v. Yaquinto*, the Fifth Circuit held that under the filed rate doctrine, a motor carrier which had negotiated a rate with a shipper for less than the tariff rate could collect undercharges. However, unlike this proceeding, the *Caravan Refrigerated* decision did not involve a referral under the primary jurisdiction doctrine to the ICC and the subsequent consideration of the ICC's decision following the referral.

¹⁵ Maislin also argues that *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), reaffirmed the validity of the filed rate doctrine. (Pet. Brief 11) That case involved a tariff rule challenged by motor carrier trade associations under which certain freight forwarders could agree to provide services to shippers at unpublished rates determined by averaging prior charges to those shippers. The District of Columbia Circuit, in finding that the tariff rule did not meet the filing requirements of 49 U.S.C. §10761(a), reaffirmed that Section 10761(a) requires that a carrier must file its rates with the ICC. However, the decision did not involve the issue of equitable defenses to undercharge claims, and did not imply that Section 10761(a) permits motor carriers to engage in unlawful and unreasonable practices. *Id.* at 879-80.

... In *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), the Supreme Court held that shippers could not use antitrust law to challenge the legality of tariff rates filed with the ICC, even where the carrier conspired to fix rates in violation of the Sherman Act, because the rates had been approved by the ICC. *Id.* at 415-16. In *Maxwell*, the Supreme Court held that the lawfully filed rate of the carrier must be charged by the carrier and paid by the shipper, and that a shipper is not excused from paying the full amount of the filed tariff. In both *Square D* and *Maxwell*, however, the rates enforced by the Court were presumptively reasonable because they had been approved by the ICC. Therefore, collection of those rates was mandated by law. Neither case concerned rates or practices deemed to be unreasonable by the ICC. The "courts have never held that the Commission lacks authority to prohibit the unreasonable collection of undercharges" under section 10701. *Seaboard*, 794 F.2d at 638 (emphasis added).

(Pet. App. 9a)

In summary, the Court of Appeals, citing the *Seaboard System* and *Negotiated Rates I* decisions with approval, properly concluded that nothing prohibits the ICC from changing its policy on enforcing the unreasonable practices provision of 49 U.S.C. §10701(a), that changed circumstances warranted reexamination by the ICC of its previous policy of refusing to consider equitable defenses, and that equitable defenses can be considered pursuant to 49 U.S.C. §10701(a) to determine the reasonableness of a motor common carrier's billing practices. These findings by the Court of Appeals are consistent with past precedents, comport with the pertinent provisions of the ICA, and should be affirmed by this Court.

2. The Determination Of The Reasonableness Of Petitioners' Billing Practice Under 49 U.S.C. §10701(a) Is Within The Interstate Commerce Commission's Primary Jurisdiction.

Maislin contends that the Court of Appeals committed error in finding that the issue of the reasonableness of Maislin's billing practice was an issue properly within the ICC's primary jurisdiction. Maislin further contends that this issue is a question of law and within the competence of the judiciary. (Pet. Brief 12-18) Both contentions are without merit.

The conclusion of the Court of Appeals, that under the doctrine of primary jurisdiction the reasonableness of Maislin's billing practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed to Primary was properly determined by the ICC, is fully supported by precedent.

This Court has considered the application of the doctrine of primary jurisdiction on various occasions and concluded that it should be exercised by the courts if the issues in the proceeding "turn on a determination of the reasonableness of a challenged practice," or raise a "question of the validity of a rate or practice." *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304-06, 96 S.Ct. 1978, 1987-88 (1976). The doctrine should also be exercised over any matter that "... raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the ICA]." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65, 77 S.Ct. 161, 166 (1956). See also *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-32, 60 S.Ct. 325, 329 (1940).

The lower courts have also made clear that the issue of the reasonableness of a practice sought to be applied by a carrier in its tariff should be referred in the first

instance to the ICC for initial determination. As noted by the Eleventh Circuit in *Seaboard System R.R., Inc. v. United States*, 794 F.2d at 638, "finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission." See also *Carriers Traffic Serv. v. Anderson, Clayton & Co.*, 881 F.2d at 477; *Western Transp. Co. v. Wilson & Co., Inc.*, 682 F.2d at 1231; *Iowa Beef Processors v. Ill. Central Gulf R. Co.*, 685 F.2d 255, 261 (8th Cir. 1982).

Moreover, the majority of the Courts of Appeals that have been presented with similar claims for undercharges have determined that the reasonableness of a motor common carrier's billing practices falls within the primary jurisdiction of the ICC, and that the filed rate doctrine does not preclude referral to the ICC for resolution of those issues. See *West Coast Tank Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d at 1020-22 (9th Cir.); *Delta Traffic Service v. Appco Paper & Plastics*, 893 F.2d 472, 475 (2nd Cir. 1990). See also *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 550 (8th Cir.) (District Court reversed based on the finding that the reasonableness of the carrier's billing practice was within the primary jurisdiction of the ICC, and that the District Court should have deferred to the ICC's decision). But see *Matter of Caravan Refrigerated Cargo, Inc.*, *supra* (District Court's denial of referral affirmed on finding that a defense to a carrier undercharge action based on the unreasonableness of failing to file negotiated rates does not raise technical or complex issues requiring the expert administration of the ICC).¹⁸

The District Court's referral of the issue of the reasonableness of Maislin's billing practice (i.e., Maislin's practice of assessing and rebilling higher rates than those originally quoted, confirmed and billed to Primary)

¹⁸ There are numerous cases pending before courts and the ICC (see Pet. App. 45a-53a) and "millions of dollars" are involved in those cases. *Negotiated Rates II*, 5 I.C.C. 2d at 636.

to the ICC has been the traditional method utilized by courts for the determination of reasonableness issues arising under 49 U.S.C. §10701(a). Such issues are complicated matters which Congress entrusted to the ICC, and which the courts have long recognized to be properly determined by the ICC's special competence and expertise. *United States v. Western Pacific R.R. Co.*, 352 U.S. at 63-64, 77 S.Ct. at 164-65; *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 549 (the "ultimate statutory issue," the reasonableness of a carrier's billing practices, "involves inherently factual inquiries" within the special competence of the ICC).

The recognition by the Court of Appeals that the decision of whether to permit Maislin to collect undercharges directly involved the reasonableness of its billing practice, and the Court of Appeals' affirmance of the District Court's holding that the ICC had primary jurisdiction to determine the reasonableness of Maislin's billing practice, are fully supported by precedent and should be affirmed by this Court.

3. The Interstate Commerce Commission's Decision Is A Reasonable Accommodation Between Competing Sections Of The Interstate Commerce Act.

The essence of Maislin's position in this proceeding is that the filed rate doctrine requires the application of the provisions of 49 U.S.C. §10761(a) in a mechanical and slavish manner despite the fact that a motor common carrier may have engaged in an unreasonable practice. (Pet. Brief 9-12) By characterizing the dispute as only involving rate reasonableness, and refusing to recognize that the Court of Appeals, the District Court, and the ICC have all properly recognized that the dispute involves the issue of the reasonableness of Maislin's billing practice, Maislin cavalierly argues that the enforcement of the unreasonable practices doctrine must always be subordinated to the enforcement of the filed rate doctrine.

In interpreting a statute an agency and the courts must avoid absurd results and deal with internal inconsistencies within a statute. See *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527 (1981); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643, 98 S.Ct. 2053, 2061 (1978). They must also seek to adopt a construction which gives effect to all of a statute's provisions. See *Jarecki v. G. D. Searle & Co.*, 367 U.S. 306, 307-08, 81 S.Ct. 1579, 1582 (1961); *Darling v. Bowen*, 878 F.2d 1069, 1076 (8th Cir. 1989).

The filed rate doctrine embodied in 49 U.S.C. §10761(a), and the unreasonable practices doctrine embodied in 49 U.S.C. §10701(a), are both mandated by the ICA. Each of these statutory sections control in appropriate circumstances and must be given effect, and when the sections conflict the ICC is the proper forum for the resolution of such a dispute.

The Court of Appeals squarely addressed this issue, finding that "[s]ection 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the Interstate Commerce Act elevating this section over section 10701, which requires that tariff rates be reasonable." (Pet. App. 9a). See also *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 548. In the event of a dispute as to the application of the two statutory sections, the proper authority to harmonize these competing provisions is the ICC. *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d at 1027; *Seaboard System R.R. Co. v. United States*, 794 F.2d at 638; *Negotiated Rates II*, 5 I.C.C. 2d at 627.

Under this approach, the ICC is exercising its authority to consider all of the circumstances, including equitable defenses, to determine the reasonableness of the billing practices under 49 U.S.C. §10701(a), but it is not abolishing the requirement in 49 U.S.C. §10761(a) that a carrier must charge the tariff rate. *West Coast*

Truck Lines, Inc. v. Weyerhaeuser Co., 893 F.2d at 1027; *INF Ltd. v. Spectro Alloys Corp.*, 881 F.2d at 548; *Negotiated Rates I*, 3 I.C.C.2d at 103 (JA 16-17).

The Court of Appeals properly determined that the ICC decision "represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act". (Pet. App. 12a) To have found otherwise would have produced an absurd result and improperly granted validity to Maislin's attempt to give no effect, and in essence to write out of the ICA, the unreasonable practices doctrine embodied in 49 U.S.C. §10701(a).

4. The Statutory Provisions Of The Interstate Commerce Act Permit The Interstate Commerce Commission's Consideration Of The Unreasonable Practices Provision of 49 U.S.C. §10701(a).

Maislin argues that the ICC does not have the authority to change its policy concerning the filed rate doctrine because the MCA contained no specific statutory provisions authorizing such a change. (Pet. Brief 18-24) This argument is without merit.

It is well-settled that the ICC may alter its past interpretation, and if the ICC in resolving an issue departs from its settled precedent, it must adequately explain its change in policy. See, e.g., *Seaboard System R.R. Co. v. United States*, 794 F.2d at 639; *Intercity Transp. Co. v. United States*, 737 F.2d 103, 108 (D.C. Cir. 1984). A court must accept such a change if the ICC's new interpretation is reasonable. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782 (1984); *General American Transp. Corp. v. I.C.C.*, 872 F.2d 1048, 1059 (D.C. Cir. 1989), suggestion for rehearing *en banc* denied, 883 F.2d 1029 (1989), *cert. denied* on February 20, 1990. Moreover, an administrative agency's interpretation of its own regulations is entitled to substantial deference. *Marathon*

Oil Co. v. United States, 807 F.2d 759, 765 (9th Cir. 1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1593 (1987). As stated by this Court in *American Trucking Ass'ns., Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618 (1967):

... the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice ... Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

See also *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 953, 104 S.Ct. 2160 (1984).

Based on the "relaxed regulatory requirements" in the MCA, and the ICC's determination that the enforcement of the unreasonable practices provision of 49 U.S.C. §10701(a) would not undermine the anti-discrimination goals of the filed rate doctrine, the Court of Appeals properly concluded that the ICC's new interpretation permitting the assertion of equitable defenses was reasonable.

... Here, the ICC evaluated the effects of the relaxed regulatory requirements in the Motor Carrier Act of 1980. It concluded that giving effect to negotiated rates, through its jurisdiction to enforce "reasonable practices" under section 10701, can avoid injustice without undermining the anti-discrimination goals of the filed rate doctrine. *Negotiated Rates*, 3 I.C.C.2d 99. The ICC further explained that in light of the regulatory changes the "inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate

illegally between the shippers." *Seaboard*, 794 F.2d at 638 (quoting *Buckeye*, 1 I.C.C.2d 767). We believe that the ICC decision represents a reasonable accommodation of conflicting policies that were committed to its administration by the Interstate Commerce Act. (Pet. App. 12a)

Citing *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692 (1951) and *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 79 S.Ct. 904 (1959), Maislin states that those decisions left purchasers of motor common carriage without any remedy whatsoever with respect to unreasonable rates on past shipments. Maislin then argues that the statutory remedy created by Congress with the enactment of Pub. L. 89-170, 79 Stat. 651, September 6, 1965, only provided a reparations remedy for unreasonable rates, and did not provide a cause of action or defense for an unreasonable carrier practice. (Pet. Brief 18-24)

This Court in *T.I.M.E.* determined that the Motor Carrier Act of 1935 did not provide a reparations remedy for a shipper to recover for past unreasonable practices or rates. *Id.* at 470, 79 S.Ct. at 908. However, in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 83 S.Ct. 157 (1962), decided three years later, the effect of *T.I.M.E.* was narrowed. In *Hewitt-Robins*, a shipper brought an action against a carrier and asserted that the carrier's practice of billing the shipper at a higher interstate rate rather than at a lower intrastate rate was unreasonable. In reversing the Court of Appeals, this Court held that the prior decision in *T.I.M.E.* was not controlling and confirmed that a shipper may assert the statutory unreasonableness of past motor carrier practices in court proceedings, and then obtain referral of such issues to the ICC for substantive determination. *Id.* at 85, 83 S.Ct. at 158. This Court also noted that similar assertions of the past unreasonableness of motor carrier rates were not permitted under the then existing law,

because Congress had created an alternate remedy of protest and suspension of rates prior to their effectiveness, and had been silent as to the survival of a post-shipment damage remedy. *Id.* at 87, 83 S.Ct. at 159.

In 1965, Congress reversed the prohibition pertaining to rate unreasonableness by amending the ICA. Pub. L. 89-170, 79 Stat. 651, September 6, 1965 (amending then 49 U.S.C. §304(a)). Contrary to Maislin's contention, by this action Congress restored the existence of parallel remedies in post-shipment damage litigation involving either unreasonable rates or unreasonable practices which had existed prior to *T.I.M.E.* and *Hewitt-Robins*.¹⁷

When the ICA was recodified in 1978, Pub. L. 95-473, 92 Stat. 1337, October 17, 1978, unitary provisions were created to continue post-shipment damage remedies applying to both unreasonable rates and unreasonable practices. See 49 U.S.C. §§10701(a), 10704(b)(1), 11705(b)(3), 11705(c)(1) and 11706(c)(2).¹⁸ As a result, 49 U.S.C. §11705(b)(3) provides the ICC with the authority to award reparations "resulting from the imposition of

¹⁷ This conclusion is supported by the legislative history. The provision "... restore[d] a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case... and would not affect in any way the right of shippers to recover damages for misrouting under the *Hewitt-Robins* doctrine." H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965), reprinted in 1965 U.S. Code Cong. & Admin. News, p. 2927.

¹⁸ This combination of prior separate provisions in the recodification merely corrected variances and inconsistencies in the use of synonymous terms in the prior statute. See Historical Revision Notes, following 49 U.S.C. §10101, 49 USCA Transportation [partial revision], 1989 Pamphlet, at 97-98. See also *Purolator Courier Corp. v. I.C.C.*, 598 F.2d 225, 227, n.5 (D.C. Cir. 1979) (enactment of the recodified ICA was not intended to make substantive changes to the original ICA, but the new language may serve as a guide to the meaning of the original ICA).

rates for transportation or service." This provision is certainly broad enough to include Primary's claim that Maislin's billing practice is an unreasonable practice pursuant to 49 U.S.C. §10701(a). Thus, the referral procedures are identical whether a shipper in a court proceeding pleads a defense of unreasonable rates or unreasonable practices, and this Court should disregard Maislin's contentions to the contrary.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed in its entirety.

Respectfully submitted,

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL., PETITIONERS

v.

PRIMARY STEEL, INC., ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's determination that a motor common carrier should be denied recovery of its tariff rate, because of its unreasonable practices in failing to file the negotiated rate originally charged, is compatible with the "filed rate" doctrine.

2. Whether, in a motor carrier's civil action against a shipper to collect unpaid tariff charges, a court is required under the primary jurisdiction doctrine to refer to the ICC the question whether the carrier's unreasonable practices should bar it from collecting the tariff rate.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-624

MAISLIN INDUSTRIES, U.S., INC., ET AL., PETITIONERS

v.

PRIMARY STEEL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.2d 400. The opinion of the district court (Pet. App. 14a-26a) is reported at 705 F. Supp. 1401. The opinion of the district court granting referral to the Interstate Commerce Commission (J.A. 5-8) is unreported. The decision of the Interstate Commerce Commission (Pet. App. 28a-44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1989. The petition for a writ of certiorari was

(1)

filed on October 16, 1989, and granted on January 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of Sections 10701(a), 10704(b), 10761(a), and 10762(a)(1) of the Interstate Commerce Act, 49 U.S.C. 10701(a), 10704(b), 10761(a), and 10762(a)(1) (1982 & Supp. V 1987) are set forth in an appendix to this brief (App., *infra*, 1a-2a).

STATEMENT

A. The Development of the ICC's *Negotiated Rates* Policy

1. Since 1935, the Interstate Commerce Commission has regulated interstate transportation by motor carriers. Motor Carrier Act of 1935, ch. 498, 49 Stat. 543. Under the Interstate Commerce Act (Act), motor carriers providing transportation services subject to ICC regulation must publish all common carrier rates in tariffs filed with the Commission. 49 U.S.C. 10761(a), 10762(a)(1). The Act further provides that a carrier "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a).

The Act also requires that a carrier's "rate[s]" and "practice[s]" must be reasonable. 49 U.S.C. 10701(a). The authority to enforce the requirement of reasonable rates and practices is reposed exclusively in the ICC. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987). If the ICC determines that a carrier is charging a rate or is engaging in a practice that is unreasonable, the ICC "shall prescribe the rate * * * or practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1) (1982 & Supp. V 1987).

In a series of cases decided under the Interstate Commerce Act in the early part of this century, this Court developed the principles that later became known as the

"filed rate" doctrine. Under that doctrine, when a carrier files an action in court seeking to recover unpaid tariff charges, the court may not entertain any defense based on the carrier's misquotation of the tariff rate or the shipper's ignorance of that rate. See, *e.g.*, *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915); *Texas & Pacific Ry. v. Mugg*, 202 U.S. 242, 245 (1906); *Gulf, Colorado & Santa Fe Ry. v. Hefley*, 158 U.S. 98 (1895). A primary purpose of the filed rate doctrine, as initially enunciated by this Court, was to reinforce the statutory prohibition against rate discrimination. See *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922). In addition, by divesting courts of the authority to inquire into the reasonableness of imposing a tariff rate in a particular situation, the filed rate doctrine protects "the agency's primary jurisdiction over reasonableness of rates[.]" *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-578 (1981); *Arizona Grocery Co. v. Atchison, T.&S.F. Ry.*, 284 U.S. 370, 384 (1932).

2. In 1980, Congress enacted the Motor Carrier Act of 1980 (MCA), Pub. L. No. 96-296, 94 Stat. 793, which substantially revised the transportation policy of the United States by encouraging a more competitive environment in the motor carrier industry. Congress directed the ICC, in regulating motor carriers, "to promote competitive and efficient transportation services in order to (A) meet the needs of shippers * * * [and] (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public." 49 U.S.C. 10101(a)(2). Several provisions of the MCA reflect this pro-competition policy. The MCA significantly relaxed restrictions on entry into the motor carrier industry, which resulted in a doubling of the number of licensed motor common carriers during the last decade.¹ The MCA also per-

¹ In 1980, there were approximately 17,000 regulated motor common carriers. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 12 (1980). In 1988, there were over 37,000 such carriers. 1988 ICC Ann. Rep. 141, App. E, Table 1.

mitted carriers to operate as both common carriers and contract carriers, thereby freeing carriers to tailor rates to individual shippers.² In addition, in carrying out the MCA's goals, the ICC has authorized common carriers to exercise broader operating authority than previously permitted,³ and has removed restrictions on volume discounts and common-carrier rates that are specifically limited to a named shipper.⁴ The ICC has also sought to facilitate the competitive negotiation of rates by authorizing motor carriers to file tariffs lowering their rates on one day's notice.⁵ 49 C.F.R. 1312.39(h)(1).

As a consequence of these regulatory changes, it is common today for carriers and shippers to negotiate the rates charged for particular transportation services. Typically, carriers and shippers will agree upon a rate and other pertinent terms and conditions, the shipper will

² The MCA repealed the limitations on a carrier's ability to hold both common and contract carrier authority. See Pub. L. No. 96-296, § 10(b), 94 Stat. 800. A contract carrier may charge a rate to an individual shipper that is different from the rate charged to other, similarly situated shippers. See *Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 310 n.44 (D.C. Cir.) (per curiam), cert. denied, 474 U.S. 1019 (1985).

³ A carrier may now readily obtain authority to transport virtually all commodities throughout the contiguous 48 states. See *Acceptable Forms of Requests for Operating Authority*, 133 M.C.C. 328 (1984), aff'd in part and rev'd on other grounds *sub nom. American Trucking Ass'n v. ICC*, 659 F.2d 452 (1981), mandate enforced, 669 F.2d 957 (5th Cir. 1982), cert. denied, 460 U.S. 1022 (1983).

⁴ See *Petition for Declaratory Order—Lawfulness of Volume Discount Rates—Motor Common Carrier of Property*, 365 I.C.C. 711 (1982), and *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984).

⁵ *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I.C.C.2d 146 (1984), aff'd *sub nom. Southern Motor Carriers Rate Conference v. United States*, 773 F.2d 1561 (11th Cir. 1985). Previously, a motor carrier had to have a tariff rate on file for 30 days before implementing the new rate.

tender freight to the carrier in reliance upon these agreed-upon terms, and the carrier will then bill the shipper and receive payment at the negotiated rate. The shippers involved in this process generally assume, or in some cases are expressly told, that the carriers will incorporate the negotiated rates in tariffs that will be properly filed with the ICC.

Some motor common carriers, however, have not always complied with the statutory tariff filing requirements. As long as the carrier remains a going concern, these derelictions may go unnoticed. When a carrier becomes bankrupt, however, the receiver or trustee will often retain an auditor to search the records of the carrier for instances in which the rates the carrier billed and collected were lower than the applicable rates on file at the ICC. When these discrepancies are uncovered, the receiver or trustee will then file a collection action to recover the difference from the unsuspecting shipper. Because of rising numbers of motor carrier bankruptcies brought about by increased competition, the number of such actions has increased significantly in recent years. Such claims have also proliferated because some failed carriers made thousands of shipments without properly adjusting their filed tariffs. See 1988 ICC Ann. Rep. 66 & n.9 (McLean Trucking Company bankruptcy alone involved approximately 1,800 undercharge claims).

3. As these actions to recover unpaid tariff charges on behalf of bankrupt carriers became more common, a national shippers' association requested the ICC to address the problem. In response, the ICC carefully considered the issues raised by the increasingly prevalent carrier practice of failing to file negotiated rates, and adopted a policy statement designed to address that practice. *National Indus. Transp. League—Petition to Institute Rule-making on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) [hereinafter *Negotiated Rates I*, re-

produced at J.A. 11-25].⁶ The Commission explained that in regulating the reasonableness of carrier practices it was required to accommodate the traditional antidiscrimination goal of the Act with the current congressional emphasis on competition and the marketplace consequences that competition had engendered. Although the filed rate doctrine prohibits courts from considering equitable defenses to carrier undercharge actions, the Commission concluded that the doctrine does not preclude the ICC from exercising its regulatory power under 49 U.S.C. 10701(a), 10704(b)(1) (1982 & Supp. V 1987) to ensure that carrier billing practices are reasonable. In view of the vastly changed regulatory and business environment under the MCA, the Commission determined to reconsider prior policies that had governed its regulation of unfilled motor carrier rates. J.A. 16-17.

The Commission stressed that "carriers must continue to charge the tariff rate, as provided in the statute." J.A. 16. But the ICC explained that "an inflexible policy" of enforcing the filed rate when a carrier had negotiated a rate with a shipper, but had failed to file that rate in a tariff, would "frustrate[] the intent of the [national transportation policy] to encourage pricing innovation, since it could chill rate negotiation between shippers and carriers, and inhibit legitimate pricing initiatives." The Commission further concluded that enforcement of the filed rate "regardless of the circumstances is inappropriate and unnecessary to deter discrimination today." J.A. 20. Noting that "the filed rate doctrine was not intended to condone or reward carriers in the circumstances in-

⁶ The shippers' association had proposed that the ICC promulgate a blanket rule declaring that whenever a carrier and shipper have negotiated a rate and the carrier then fails to file an appropriate tariff, the negotiated rate is the maximum reasonable rate that the carrier may charge, provided that the shipper entertained a good faith belief that the negotiated rate was legally applicable. The Commission rejected that proposal in favor of a case-by-case approach based on the reasonable-practice provision of the Act. *Negotiated Rates I*, J.A. 12 & n.1, 14-16.

volved here, especially where carrier actions may constitute fraudulent business practices," J.A. 17, the ICC announced that in carrier actions to collect unpaid tariff charges, it would conduct an "advisory analysis," on referral from a court under the primary jurisdiction doctrine, to "determine * * * whether collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice and, if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect." J.A. 22.

4. On the basis of *Negotiated Rates I*, many district courts granted the motions of shippers to refer collection actions to the ICC for a determination whether the parties had agreed on rates that the carrier had failed to file as required by law and whether, under the circumstances, the carrier had engaged in an unreasonable practice. See, e.g., *Delta Traffic Service Inc. v. Marine Lumber Co.*, 683 F. Supp. 754 (1987), after referral, 705 F. Supp. 513 (D. Or. 1989), aff'd, 893 F.2d 1016 (9th Cir. 1990); *Motor Carrier Audit & Collection Co. v. Family Dollar Stores, Inc.*, 670 F. Supp. 644 (W.D.N.C. 1987). Other courts, however, viewed the ICC's policy statement as simply offering to render a non-binding "advisory" analysis on the issue, and concluded that reference to the Commission was incompatible with the filed rate doctrine. See, e.g., *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), petition for cert. pending, No. 88-1958.

To clarify its policy, and in response to another petition from a shippers' association, the Commission issued a second statement on the issue. *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623, 626 (1989) [hereinafter *Negotiated Rates II*].⁷ That statement reaffirmed that the ICC's source of authority for its negotiated rates policy is the statutory requirement that a carrier's practices must be reasonable; consequently, the ICC's determinations constitute a legal,

⁷ For the Court's convenience, we have lodged copies of the Commission's decision in *Negotiated Rates II* with the Clerk's office.

rather than an "equitable" defense to an undercharge action. 5 I.C.C.2d at 628 & n.11. To remove any confusion resulting from its use of the term "advisory analysis" in *Negotiated Rates I*, the ICC also explained that its determinations result in "binding and dispositive" orders, subject to review only for arbitrariness and capriciousness. *Id.* at 624, 625. Finally, to protect its jurisdiction in light of the refusal of some courts to refer such claims, the ICC announced that it would rule on negotiated-rates allegations by shippers without awaiting a court referral. *Id.* at 635-636.

B. The Present Controversy

1. a. From 1981 to 1983, a division of Maislin Industries, U.S., Inc. (Maislin), operating as a certificated motor common carrier, made 1,081 shipments of steel for Primary Steel, Inc. (Primary). The vast majority of the shipments were from Primary's Connecticut facilities to 157 destinations in 12 States. Primary negotiated rates with Maislin for this transportation, and Primary understood that Maislin would file the rates in tariffs with the ICC.* Despite that understanding, Maislin failed to file the negotiated rates in proper tariffs. Pet. App. 2a, 30a.

Following Maislin's bankruptcy, an audit agency appointed by the bankruptcy court claimed that Maislin's actual tariff rates were higher than the rates charged to Primary. Maislin then commenced an action in district court to recover alleged undercharges in the amount of

* Maislin had originally solicited Primary's business in 1979. At that time, Primary told Maislin that it would consider using Maislin if its rates were competitive with those of another firm, P&NE Trucking Co. Based on Maislin's representation that it would meet those rates, Primary began tendering freight to Maislin. Pet. App. 31a. Subsequent rates were also negotiated between Primary and Maislin based on this competitive situation. *Id.* at 31a-32a.

\$187,923.36.⁹ Relying on the primary jurisdiction doctrine, the district court granted referral to the ICC of Primary's claim that the alleged undercharges resulted from unreasonable practices in violation of the Interstate Commerce Act. Pet. App. 2a, 14a, 17a-19a; J.A. 5-8.

b. Citing its policy statement in *Negotiated Rates I*, the ICC rejected Maislin's argument that an unreasonable-practice determination in the circumstances of this case would violate the filed rate doctrine.¹⁰ The Commission noted that "[i]n the past, ignorance or misquotation of rates generally was not an excuse for paying less than the tariff rate." But "in today's more flexible pricing atmosphere[,] * * * penalizing a shipper for the mistakes of a carrier may be unnecessary to deter discrimination" and would "frustrate[] the intent of the national transportation policy to encourage pricing innovation." The ICC emphasized that it was "not abolishing the requirement in [49 U.S.C. 10761] that carriers must continue to charge the tariff rate." Pet. App. 36a. Nevertheless, the Commission found that "our jurisdiction over unreasonable practices gives us discretion to find that the tariff rate filed by motor carriers need not and should not be applied in a particular case," explaining that it was authorized under 49 U.S.C. 10701(a) and 10704 (1982 & Supp. V 1987) "to consider all the circumstances surrounding an undercharge suit." Pet. App. 34a-35a. The Commission further explained that its inquiry was remedial in nature—to address the carrier practice of negotiating a rate with a shipper, but to file that rate in a tariff even though billing and collecting at it. Pet. App. 35a.

Applying those principles, the ICC found that Maislin's solicitation and billing practices were unreasonable. On

* Maislin did not designate the tariff that it believed was applicable, but simply asserted a balance due. J.A. 7.

¹⁰ The Commission's order in this case was entered on January 12, 1988, after it had issued *Negotiated Rates I*, but before it had issued *Negotiated Rates II*.

the basis of extensive factual findings, the ICC concluded that Maislin and Primary had negotiated particular shipping rates. The ICC also concluded that Primary had a reasonable basis for relying on Maislin properly to implement those rates.¹¹ Consequently, the ICC determined that Primary should not be required to pay additional charges for the difference between the negotiated rates and the tariff rates. Pet. App. 36a-44a.

c. On review of the ICC's order, the district court granted summary judgment in favor of Primary. The court rejected Maislin's arguments that the ICC had exceeded its statutory authority and that its order was barred by the filed rate doctrine. The court also determined that the ICC's order was supported by substantial evidence, and was neither arbitrary nor capricious. Pet. App. 19a-25a.

2. The court of appeals affirmed. Pet. App. 1a-13a. The court first held that the ICC had primary jurisdiction over the claim that Maislin had engaged in unreasonable practices. Relying on *United States v. Western Pacific R.R.*, 352 U.S. 59, 65 (1956), the court reasoned that the considerations of agency expertise and the uniform development of policy that underlie the primary jurisdiction doctrine apply with full force here.

The court next turned to Maislin's "central argument"—that the filed rate doctrine barred the district

¹¹ The ICC did not find that Maislin had engaged in deceit in competing for Primary's shipping business on the basis of unfiled rates. Rather, "[w]hat emerges from a review of this record is that [Maislin] attempted to obtain, in a vigorous competitive manner, Primary's traffic. It then failed to provide (for unknown reasons) for the publishing and filing of those rates." Pet. App. 42a. The ICC also found that for its part, Primary had acted reasonably in relying on those rates, and "[t]here is no evidence that [Maislin] ever demanded additional amounts over the amounts it billed at any time during its business relationship with Primary." *Id.* at 43a. Primary's ignorance of the tariff rate was a factor to "be considered in weighing the equities," but, the Commission found, did not undercut the reasonableness of Primary's belief that "the amounts quoted and billed * * * were the correct total charges." *Ibid.*

court from considering the ICC's finding that Maislin had engaged in an unreasonable practice. The court noted that the statutory source of the filed rate doctrine, 49 U.S.C. 10761(a), requires a carrier to charge the full tariff rate, and that prior Supreme Court decisions had strictly precluded equitable defenses based on ignorance or misquotation of the filed tariff. Pet. App. 7a, citing *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). The court explained, however, that the ICC has separate statutory authority, set forth in 49 U.S.C. 10701, to require carriers' practices to be reasonable. On that basis, the court distinguished *Negotiated Rates I* from the holdings of *Maxwell* and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986); although both *Maxwell* and *Square D* supported enforcement of filed rates, neither involved "rates or practices deemed to be unreasonable by the ICC." Pet. App. 9a. The court accordingly concluded that when the provisions governing the collection of rates and the reasonableness of practices conflict, "the proper authority to harmonize these competing provisions is the ICC." *Ibid.*

With those considerations in mind, the court held that the ICC's *Negotiated Rates* policy was a reasonable accommodation of statutory policies. The court determined that the ICC's policy was consistent with the requirement that a carrier charge the filed rate; the effect of the policy was to temper the consequences of that doctrine for shippers who reasonably rely on a carrier's quotation of a negotiated rate. Pet. App. 12a. The court noted that the ICC had properly explained its change in policy by referring to the relaxation of regulatory requirements under the MCA. *Ibid.* The ICC had reasonably determined, the court concluded, that "in light of the regulatory changes 'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between the shippers.'" *Ibid.*, quoting *Seaboard System*

R.R. v. United States, 794 F.2d 635, 638 (11th Cir. 1986).

SUMMARY OF ARGUMENT

This case involves a challenge to the validity of the ICC's *Negotiated Rates* policy. After a thorough reevaluation of its prior policies, the ICC announced in *Negotiated Rates* that it would henceforth determine, in particular cases, whether a motor common carrier had engaged in an unreasonable practice, in violation of 49 U.S.C. 10701(a), by negotiating shipping rates, failing to file those rates in tariffs despite the customer's reasonable belief that the carrier would do so, and later rebilling the shipper to collect additional charges based on higher tariff rates actually on file at the ICC. If a shipper establishes the facts showing this course of conduct, then the ICC will enter an order finding it to be an unreasonable practice for the carrier (or its trustee in bankruptcy) to enforce payment of the tariff rate.

In formulating its policy, the ICC carefully considered the competing requirements of two statutory provisions: 49 U.S.C. 10761(a), which requires that carriers charge and collect only those rates that are reflected in ICC tariffs, and 49 U.S.C. 10701(a), which requires that carriers engage only in those practices (including solicitation and billing practices) that are reasonable. The ICC determined that in the present context, Section 10701(a) should be interpreted to prevent carriers (or their bankruptcy trustees) from enjoying windfall profits based on filed tariffs when a shipper has reasonably relied on the carrier to take the steps required to make the negotiated rate lawful. In the Commission's opinion, the formulation of such a remedial policy was necessary to prevent a carrier from exploiting its own failure to fulfill its tariff-filing obligations. See 49 U.S.C. 10762(a)(1).

Petitioners operated a motor carrier that, before its entry into bankruptcy, failed to file all of its negotiated rates in tariffs with the ICC. Petitioners now seek to take advantage of their lapse by imposing additional charges

on a shipper. In an effort to avoid the ICC's regulation of their solicitation and billing practices, they claim the protection of the filed rate doctrine. The filed rate doctrine, however, does not apply in this case. The heart of the filed rate doctrine is the principle that a court may not refuse collection of tariff rates based on a claim that the rate is "unreasonable" or that its enforcement would be inequitable. The doctrine was never intended to insulate carriers from the Commission's jurisdiction to regulate unreasonable rates or practices. Rather, a carrier's right to collect a tariff rate is qualified by the Commission's power to determine that the imposition of that rate would be "unreasonable." See *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915).

Negotiated Rates is thus faithful to the historic division of authority between the courts and the Commission reflected in the ~~filed~~ rate doctrine. Just as the ICC has exclusive authority to determine whether a motor carrier rate is unreasonable, it also has exclusive authority to determine whether a carrier practice is unreasonable. Under *Negotiated Rates*, carriers must file their rates in tariffs, and no court may set aside a tariff based on a shipper's "equitable" defense. The ICC, however, retains exclusive power to find that the carrier's delinquency in filing a negotiated rate amounts to an unreasonable billing practice in violation of Section 10701.

No provision of the Interstate Commerce Act speaks directly to the question whether the Commission may interpret its authority over unreasonable motor carrier practices to preclude the conduct described in *Negotiated Rates*. Nor does the design of the statute as a whole express an intent of Congress on this point. Although *Negotiated Rates* reflects a change from prior ICC policy, it represents a proper administrative response to a recent and unanticipated trend in motor carrier practices. As we previously described (see pp. 5-7, *supra*), the ICC's policy evolved in response to the increasingly competitive environment introduced by the MCA and was framed in

light of the revised national transportation policy. The policy, accordingly, is not addressed to isolated instances of carrier negligence or fraud in billing its customers. Rather, the ICC formulated its policy only after the agency became aware of an industry-wide pattern of delayed collection actions that threatened to undermine the benefits competitive pricing had provided to shippers. *Negotiated Rates* is a reasonable response to a unique problem that arose in the motor carrier industry under the MCA; because that policy does not conflict with the filed rate doctrine, this Court should uphold the ICC's policy as applied in this case.¹²

Under the primary jurisdiction doctrine, the court of appeals correctly upheld referral to the ICC of the *Negotiated Rates* claim in this case. The primary jurisdiction doctrine requires that "[w]henver a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). The primary jurisdiction doctrine governs not only a claim that a carrier's rates are unreasonable, but also a similar claim directed at its practices.

¹² The majority of the courts of appeals that have addressed this issue have endorsed the validity of *Negotiated Rates*. See *INF, Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989), petition for cert. pending, No. 89-936; *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir. 1990); *Delta Traffic Service, Inc. v. Appco Paper & Plastics Corp.*, 898 F.2d 472 (2d Cir. 1990). Two other circuits have accepted principles closely related to *Negotiated Rates* without expressly ruling on the policy. See *Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989) (approving referral of an unreasonable-notation claim to the ICC); *Seaboard System R.R. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986) (approving an ICC finding of a rail-carrier unreasonable practice in misquoting a tariff that was unclear to the ordinary user). The Fifth Circuit stands alone in refusing to refer an unreasonable-practice claim to the ICC under *Negotiated Rates*. See *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (1989), petition for cert. pending, No. 88-1958.

Petitioners contend (Br. 12-20) that under *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), the ICC's *Negotiated Rates* policy improperly gives a remedy for past unreasonable practices. This Court, however, has never held that the ICC lacks authority to examine the reasonableness of past motor carrier practices under 49 U.S.C. 10701(a). Although in *T.I.M.E.* this Court denied the ICC the power to examine past motor carrier rates, that decision was soon thereafter narrowed by this Court to exclude certain unreasonable practices, and *T.I.M.E.* itself was overruled by Congress.

Referral of a *Negotiated Rates* claim to the ICC in the midst of an action to collect additional tariff charges does not upset the remedial scheme for challenging the reasonableness of a rate or practice contemplated by the filed rate doctrine. Rather, the refusal to refer an unreasonable-practice claim under *Negotiated Rates* would interfere with the ICC's primary jurisdiction, by effectively denying the ICC the opportunity to protect a shipper from being forced to pay charges that stem from an unreasonable practice. Accordingly, the ICC's determination to accept referrals in the midst of a tariff collection action should be upheld.

ARGUMENT

THE ICC'S NEGOTIATED RATES POLICY IS A PROPER EXERCISE OF THE COMMISSION'S POWER TO PROTECT AGAINST UNREASONABLE PRACTICES

A. The ICC's Negotiated Rates Policy Does Not Conflict With The Filed Rate Doctrine

The filed rate doctrine has historically consisted of two complementary principles. *First*, a court adjudicating a tariff collection action may neither set aside the tariff rate as unreasonable, nor entertain an equitable defense based on the shipper's understanding that a different rate would apply. *Second*, because the ICC retains exclusive authority to regulate the reasonableness of carrier rates and practices, a carrier may not collect a tariff rate the imposition of which the ICC has found to be unreasonable. Together, these principles preserve the Commission's authority to achieve uniformity and fairness in the regulation of carrier rates and practices, while protecting against discriminatory departures from the tariff. *Negotiated Rates* is firmly rooted in the ICC's power, long recognized as an integral part of the filed rate doctrine, to deny collection of the tariff rate when to do so would involve an unreasonable rate or practice.

1. The filed rate doctrine is based on the provision in the Interstate Commerce Act that carriers must file their rates in public tariffs and charge and collect only the rates filed. 49 U.S.C. 10761(a). That provision was designed to prevent carriers from engaging in rate discrimination that favored some shippers over others, which was a central objective of the Act. See, e.g., *New York, N.H. & H.R.R. v. ICC*, 200 U.S. 361, 391 (1906); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 343-344 (1982); S. Rep. No. 46, 49th Cong., 1st Sess. 181, 188-190, 198-200 (1886). In furtherance of that goal, this Court long ago ruled that a

shipper's ignorance of the tariff rate, or a misquotation of the rate by the carrier, does not justify a court in refusing to enforce the tariff rate.

The classic statement of the filed rate doctrine is set forth in *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). In that case, an individual had purchased a ticket at the rate quoted by the ticket agent without knowing that the filed tariff reflected a higher rate; he was later sued by the railroad for \$58.30 in undercharges. This Court found for the railroad, explaining:

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

237 U.S. at 97. The Court concluded that any hardship produced by that rule was necessary to fulfill the anti-discrimination purposes of the Act. *Ibid.* See also *Louisville & Nashville R.R. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924); *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908).

As the foregoing quotation from *Maxwell* indicates, however, the filed rate doctrine incorporates an important qualification: the filed rate governs "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. That qualification reflects the statutory command that a carrier's rates must be reasonable, 49 U.S.C. 10701(a), and the parallel principle that the Commission alone can determine the reasonableness of rates. As the Court explained in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the Interstate Commerce Act preempted the common-law right of a shipper to contest the reasonableness of rates in a court action. Under the Act, courts could not hear such actions, "without reference to

prior action by the Commission, finding the established rate to be unreasonable." The Court reasoned that the availability of relief for particular shippers in court actions would disrupt the uniform application of rates and would produce "a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced." *Id.* at 440. In contrast, the ICC's invalidation of unreasonable rates would not give rise to discrimination; the ICC could protect against that prospect by prescribing a rate for the future and awarding reparations to shippers injured during the period when the tariff rate was applied. *Id.* at 441-442.

Other cases expounding the filed rate doctrine similarly indicate that the court's obligation to enforce the tariff is subject to the Commission's review of the tariff for reasonableness. For example, in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922), the Court held that a shipper could not bring a private antitrust treble damages action against a carrier based on a claim that tariff rates had been fixed by an agreement prohibited by the Sherman Act. The Court stated that "[t]he legal rights of shipper as against carrier in respect to a rate are measured by the published tariff," and "cannot be varied or enlarged by either contract or tort of the carrier." Significantly, however, the Court added the caveat that the tariff rate applied "[u]nless and until suspended or set aside" by the ICC. 260 U.S. at 163.

The Court again reaffirmed the supremacy of the Commission's authority over rates in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932). In that case, the Court distinguished between carrier-initiated rates, which must be published and filed in tariffs and charged to all similarly situated shippers alike, *id.* at 384, and Commission-prescribed rates. With respect to the former, the Court observed that the Interstate Commerce Act had "altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate."

Ibid. When the Commission exercises its power to prescribe a carrier's future rates, however, those rates "take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rates." *Id.* at 387. As a result, the Court held, even the ICC could not retrospectively find that a carrier's rates were unreasonable when the rates it charged were within the range prescribed by a prior Commission order. *Id.* at 389.¹³

2. This line of cases establishes that the filed rate doctrine restricts the discretion of courts to review the reasonableness of carrier rates and practices, but does not divest the Commission of similar powers. Indeed, the exclusive authority of the ICC to review the reasonableness of rates and practices is one of the key elements of the filed rate doctrine.¹⁴ That doctrine was never intended to render the tariff rate the exclusive measure of rights between shipper and carrier when the Commission has rendered a contrary finding about the reasonableness of imposing that rate.

The *Negotiated Rates* policy was developed against the backdrop of these principles. That policy reflects an implementation of the Commission's fundamental authority to determine whether the imposition of filed rate would involve an unreasonable practice, contrary to the statute.

¹³ Although broad language in some decisions suggests that the tariff rate governs in all circumstances, see, e.g., *Pittsburgh, C.C. & St.L.Ry. v. Fink*, 250 U.S. 577, 581-582 (1919); *Boston & M.R.R. v. Hooker*, 233 U.S. 97, 112-113 (1914), those cases cannot be read to override the holdings of many other cases (including those discussed in the text) that the ICC's finding that a rate is unreasonable prevails over a tariff rate. See also p. 24, *infra*.

¹⁴ The considerations informing the filed rate doctrine are thus closely allied to those underlying the primary jurisdiction doctrine: both serve to allocate functions between court and agency in order to ensure the uniform and expert administration of a regulatory scheme. Cf. *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956).

Just as the Commission enjoys unchallenged authority to determine that a common carrier cannot insist on the exaction of filed rates found to be unreasonable, so too, the Commission may determine that a carrier cannot collect charges when their imposition involves an unreasonable practice.

The issue in this case is thus quite different from that presented in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). There, the Court refused to overrule its decision in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), which had precluded private antitrust claims based on an agreement among motor carriers to fix rates that were filed in tariffs with the ICC. The Court found that the pro-competition policies contained in the MCA were insufficient to justify reconsideration of *Keogh*. Congress was presumed to be aware of the *Keogh* rule, the Court reasoned, yet no statutory provision or specific legislative history evidenced a departure from it. In these circumstances, the Court concluded that "harmony with the general legislative purpose is inadequate for [the] formidable task" of demonstrating that Congress intended to "overturn the long-standing *Keogh* construction." 476 U.S. at 420.

Unlike *Square D*, the question here is not whether a prior decision of this Court construing an Act of Congress should be overruled. The ICC's *Negotiated Rates* policy does not depart from this Court's precedents applying the filed rate doctrine. In each of those decisions, this Court applied the filed rate doctrine to prevent a court from recognizing equitable defenses to the collection of the filed tariff rate. As such, none of those decisions speak to the ICC's power to implement the statutory requirement of reasonableness. The narrow question presented for decision is, rather, whether the unreasonable practice described by the ICC in *Negotiated Rates* reflects a permissible construction of the statute, and, if

so, whether a court hearing an action by a motor carrier to collect additional tariff charges should refer such an unreasonable-practice claim to the ICC under the primary jurisdiction doctrine. The court of appeals correctly answered both aspects of that question in the affirmative.

B. *Negotiated Rates* Provides A Permissible Remedy For An Unreasonable Carrier Solicitation And Billing Practice

Section 10701(a) of the Act declares that "a rate * * * or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission * * * must be reasonable." 49 U.S.C. 10701(a) (emphasis added).¹⁵ Section 10704(b)(1) provides that when the ICC decides that a "practice of [a motor common] carrier, does or will violate this chapter, the Commission shall prescribe the * * * practice to be followed." 49 U.S.C. 10704(b)(1). *Negotiated Rates* reflects the ICC's application of these provi-

¹⁵ Congress did not address the question of unreasonable carrier "practices" in the original Interstate Commerce Act (Act of Feb. 4, 1887), ch. 104, 24 Stat. 379. In the Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 589, Congress gave the Commission power to determine whether a railroad's practices were unreasonable and to prescribe a different practice for the future. See *ICC v. Illinois Central R.R.*, 215 U.S. 452, 475-477 (1910). In the Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 546, Congress extended that principle by imposing a duty on all rail carriers to engage in "just and reasonable * * * practices." When Congress gave the Commission authority to regulate motor carriers in 1935, it applied the same dual requirement that motor carriers must establish and observe reasonable rates and practices. Motor Carrier Act of 1935, ch. 498, § 216(b), 49 Stat. 558 (codified at former 49 U.S.C. 316 (1976)). In 1978, the Congress revised, codified and enacted Title 49 of the United States Code into positive law, without substantive change (Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3, 92 Stat. 1466, 49 U.S.C. 10101 note). In so doing, it consolidated in one section the requirement of reasonable rates and practices for all carriers (other than rail carriers) that the Commission regulates, 49 U.S.C. 10701(a). (Under current law, the requirement of reasonable rates applies to rail carriers only if the ICC finds that a carrier enjoys market dominance. 49 U.S.C. 10701a(b)(1)).

sions to a particular carrier solicitation-and-billing practice that consists of:

- (1) [N]egotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates.

Negotiated Rates II, 5 I.C.C.2d at 628 n.11.

The standards for reviewing petitioners' challenge to the validity of the ICC's interpretation of its governing statute are well settled. The first inquiry is whether the unreasonable-practice provisions, or the design of the statute as a whole, reveal an "unambiguously expressed intent of Congress" on the issue addressed by the ICC's interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (NRDC)*, 467 U.S. 837, 843 (1984). If not, then the ICC's policy must be upheld if it reflects a "permissible construction" of the provisions at issue, *ibid.*, that is, one that is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Sullivan v. Everhart*, 110 S. Ct. 960, 963-964 (1990).

1. Sections 10701(a) and 10704(b)(1) do not address the precise question whether the carrier billing practice at issue in *Negotiated Rates* may be regulated as an unreasonable practice. Each provision is framed in general terms and represents a charge to the Commission to apply its expertise, in light of the policies of the Act, to determine whether a particular practice is "reasonable." Neither provision provides an unambiguous answer to the issue faced by the ICC in this case.¹⁸

¹⁸ Amici Robert Yaquinto Jr. et al. (Yaquinto) argue (Br. 22) that the ICC's jurisdiction over unreasonable practices is limited to those practices listed in 49 U.S.C. 10702, which does not identify "misquotation or billing practices." That novel argument, embraced neither by petitioners nor the other amici, is at odds with the tradi-

Nor does the structure of the statute as a whole reveal a clearly expressed intent of Congress on this point. The Interstate Commerce Act includes a number of provisions designed to maintain the integrity of the tariff filing system. The Commission's *Negotiated Rates* policy is consistent with each of these provisions, and indeed serves to reinforce the statutory duty imposed on carriers to file and maintain their rates in published tariffs.

Section 10761(a) provides that carriers must have an effective tariff on file in order to provide transportation and that the "carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff." 49 U.S.C. 10761(a). *Negotiated Rates* does not absolve a carrier of the requirement that it charge and collect rates that it has embodied in a proper tariff. See *Negotiated Rates I*, J.A. 16 ("we emphasize that carriers must continue to charge the tariff rate, as provided in the statute"). Rather, *Negotiated Rates* speaks to the remedies available to the ICC (as opposed to the courts) when "less than the tariff rate has in fact been charged and paid for past shipments." *Seaboard System R.R. v. United States*, 794 F.2d at 638. This remedial question is a matter that the statute does not address.

tionally broad reading given to the ICC's unreasonable practice authority. See *Baltimore & Ohio R.R. v. United States*, 391 F. Supp. 249, 258 (E.D. Pa. 1975) aff'd, 594 F.2d 856 (4th Cir. 1979) (Table). To begin with, neither Section 10701(a) nor Section 10704 cross-refers to Section 10702; there is no indication that the latter provision was intended to control the former. Moreover, assuming that the cited provisions have some interrelationship, Section 10702 does not enumerate all carrier practices, but merely requires the carrier to establish "rules and practices on matters related to [its] transportation or service, including" several itemized matters. The use of the word "including" signals that the list is illustrative only, not exclusive. Cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941). Finally, this Court in *Adams v. Mills*, 286 U.S. 397 (1932), recognized that a billing practice not reflected in a tariff could constitute an "unjust and unreasonable" practice in violation of the Act.

Specifically, Section 10761(a) does not answer the question whether a tariff rate must be enforced when the application of that rate would reward a carrier's unreasonable practice. Although the carrier ordinarily has a duty to collect the tariff rate, see *Commercial Metals*, 456 U.S. at 343, the Interstate Commerce Act does not authorize collection of a tariff rate that the Commission has found to be unreasonable. See *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (recognizing propriety of a carrier's reduction of its claim below the full tariff rate after ICC had found the tariff rate to be excessive); *Pennsylvania R.R. v. United States*, 363 U.S. 202, 205 (1960) (ICC order that tariff rates were unreasonable was "by no means a mere 'advisory opinion,' its 'legal consequences' are obvious, for if valid it forecloses the 'right' of the Railroad to recover its domestic rates on those shipments"). The requirement that a carrier must employ reasonable practices is found in the same provision of the Act that requires a carrier to establish reasonable rates. 49 U.S.C. 10701(a). Since Section 10761(a) does not trump Section 10701(a) by requiring a carrier to collect an unreasonable tariff rate, it cannot be construed to require the collection of a rate produced by an unreasonable practice. As is suggested by the introductory phrase of Section 10761(a) ("Except as provided in this subtitle * * *"), that provision is intended to be read in concert with the other provisions of the Act.

Nor does the remedy adopted by *Negotiated Rates* conflict with 49 U.S.C. 10762(a), which requires that "[a] motor carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle." As this section makes clear, the Act imposes the primary duty to assure compliance with Section 10761(a) squarely on the carrier, not the shipper. Accordingly, a policy that seeks to impose the consequences of a violation of Section 10761(a) on the derelict carrier rather than the shipper is entirely consonant with this provision. Indeed, contrary to petition-

ers' suggestion that *Negotiated Rates* will undermine the tariff filing system or "condon[e] noncompliance" with the filed-rate requirement (Pet. Br. 12), the ICC's policy is designed to prevent a carrier from reaping a reward for its own failure to observe the statutory requirements.

The *Negotiated Rates* policy is also consistent with those provisions of the Act that do make express provision for remedies for the violation of Section 10761(a). Specifically, Section 11902 of the Act, 49 U.S.C. 11902, creates civil liability to the United States for a shipper's knowing receipt of a rebate, and Section 11903 of the Act, 49 U.S.C. 11903, imposes criminal liability for the knowing receipt by a shipper (or provision by a carrier) of transportation at below-tariff rates. A shipper that violates those provisions by knowingly paying a negotiated but unfilled transportation rate would be barred from taking advantage of the Commission's *Negotiated Rates* policy, because reliance on the applicability of the negotiated rate must be reasonable. On the other hand, a carrier that violates these provisions is hardly in a position to complain if it is later denied the windfall of a higher tariff rate that exists only because it breached its duty to make a timely tariff filing.¹⁷

In this regard, we do not agree with the suggestion advanced by amici Yaquinto et al. (Br. 15) that the statute embodies a strict policy that imputes "constructive knowledge" of the tariff rate to all persons for all purposes, so that a shipper's reliance on a carrier to implement a negotiated rate can never be reasonable. Such a reading of the Act would render superfluous the specific "knowledge" requirements that are needed to establish

¹⁷ Moreover, the fact that the statute specifies certain remedies when a carrier collects a rate not filed in a tariff does not exclude the ICC from applying its reasonable-practice powers to the same conduct. See 49 U.S.C. 10321(a) ("The Interstate Commerce Commission shall carry out this subtitle. Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle."); *ICC v. American Trucking Ass'ns*, 467 U.S. 354, 359 n.3 (1984).

violations involving a deviation from the filed rate under 49 U.S.C. 11902, 11903, 11904 (1982 & Supp. V 1987). See *United States v. United States Steel Corp.*, 645 F.2d 1285, 1294-1297 (8th Cir. 1981) (explaining that a shipper's honestly mistaken departure from published rates or its honest mistake as to the appropriate rate was not covered by the predecessor of 49 U.S.C. 11902). The ICC has long adhered to the principle that the reasonableness of attributing knowledge of the tariff rate to a person depends upon the particular circumstances. See *Piedmont Mills, Inc. v. Norfolk & Western Ry.*, 296 I.C.C. 481, 485 (1955) (presumption that shippers are conversant with the published tariff not applied in the face of longstanding assurances by the carrier that a different rate applied).¹⁸ A rule of imputed knowledge in all cases would be particularly inappropriate in view of the intensely competitive environment produced by the MCA. As the Commission noted in *Negotiated Rates*, the myriad of rapid rate changes characteristic of the contemporary motor carrier industry has made it "extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file." J.A. 20.

Finally, the ICC's policy does not conflict with the antidiscrimination provision of the Act. 49 U.S.C. 10741 (1982 & Supp. V 1987). To be sure, under *Negotiated Rates*, a shipper whose unreasonable-practice claim is referred to the ICC can be protected against paying the rate reflected in a filed tariff, while that rate may in

¹⁸ Although some older cases of this Court state that knowledge is presumed, *Kansas City Southern Ry. v. Carl*, 227 U.S. 639, 653 (1913) ("The shipper's knowledge of the lawful rate is conclusively presumed * * *"); *Chicago & Alton R.R. v. Kirby*, 225 U.S. 155, 166 (1912) (shipper was "presumed to have known" of published rates), those cases did not involve instances where the shipper reasonably relied on the carrier to implement a negotiated rate by properly filing a tariff. Since only a carrier can file a tariff, 49 U.S.C. 10762(a)(1), the ICC may reasonably conclude, in remedial proceedings, that the shipper should not be compelled in a particular case to bear the costs of the carrier's breach of that duty.

theory have been applied to some other shippers. The same is true, however, whenever a claim of unreasonable rates is referred to the ICC. Nevertheless, it has been settled since *Abilene Cotton* that a finding by the ICC that a tariff rate is unreasonable does not produce discrimination in violation of the statute. 204 U.S. at 441-442. If a shipper has previously paid the tariff rate, rather than lower rates negotiated with other shippers, it may bring a claim alleging unreasonable discrimination, 49 U.S.C. 11705(b)(3), and may recover if it satisfies applicable standards governing such a claim. See *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959, 963 (1984) (describing criteria for a discrimination claim).¹⁹

2. Because the Interstate Commerce Act does not speak to the precise question addressed in *Negotiated Rates*, the validity of the policy turns on its reasonableness in light of the statutory scheme. In *Negotiated Rates I*, the Commission explained the considerations that prompted its

¹⁹ Petitioners (Br. 28-29) and Amici Oneida Motor Freight, Inc. et al. (Br. 11-12) also rely on the Household Goods Transportation Act of 1980, 49 U.S.C. 10735(a)(1) (1982 & Supp. V 1987) in an effort to demonstrate that Congress deliberately intended to preclude the ICC from recognizing a defense to a carrier's collection action based on the filed rate. That provision states that a motor common carrier may "establish a rate for the transportation of household goods which is based on the carrier's written, binding estimate of charges for providing such transportation." Amici Oneida imply that because Congress in that context specifically provided for "a negotiated unfiled rate to be binding on the parties" (Br. 11), it could not have intended to authorize such a result in any other context. But the household goods provision addressed the quite different problem of consumer dissatisfaction with a carrier's departure from a quotation because of an incorrect estimate of the weight of the goods to be shipped, not an incorrect quotation of the tariff rate. See H.R. Rep. No. 1372, 96th Cong., 1st Sess. 7 (1979). "In order to address this problem, these subsections create a foundation for written binding estimates." *Ibid.* There can be no negative implication from this provision that Congress intended to limit the Commission's powers under its unreasonable-practices jurisdiction, as applied to motor carriers that violate the Act by failing to file their negotiated rates.

action. While the Commission historically rejected claims that the misquotation of rates impairs the carrier's right to collect the filed rate, see *A.J. Poor Grain Co. v. Chicago, B.&O. Ry.*, 12 I.C.C. 418, 422-423 (1907), Congress's substantial amendment of the national transportation policy in the MCA caused the ICC "to take a fresh look at the proper regulatory response to the matter of unfilled negotiated motor carrier rates." J.A. 18.

In the MCA, Congress declared that "it is the policy of the United States Government * * * in regulating transportation by motor carrier, to promote competitive and efficient transportation services," in order to achieve, among other things, "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping * * * public." 49 U.S.C. 10101(a)(2).²⁰ Under the MCA, thousands of new carriers have entered the market and have competed vigorously for business, under a regime allowing for far greater pricing freedom than prevailed under prior law. With "hundreds, or even thousands, of individual motor common carrier rates * * * negotiated daily," the ICC noted "it can be extremely difficult for shippers to determine, prior to movement, whether the agreed rate is actually on file." J.A. 20. Rigid enforcement of the tariff rate when "a motor common carrier has negotiated a lower rate and has indicated that the negotiated rate would be the one charged (and therefore presumably filed as a tariff)" threatened to undercut the development of competitive markets, as intended by the MCA. *Ibid.*

At the same time, the MCA authorized pricing activities that would previously have constituted unlawful discrimination. For example, the MCA eliminated the prohibition against a carrier's holding dual authority to en-

²⁰ See H.R. Rep. No. 1069, 96th Cong., 2d Sess. 27-28 (1980); 126 Cong. Rec. 7,777 (1980) (statement of Sen. Cannon). This Court has recognized that "[t]he legislative history of the Act is clear that * * * Congress wanted the forces of competition to determine motor-carrier tariffs." *ICC v. American Trucking Ass'n*, 467 U.S. 354, 367 (1984).

gage in both contract and common-carrier operations. See *Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d at 311 & n.55. A carrier operating in contract capacity can serve a shipper without publishing its rates in tariffs at all, *id.* at 305, and without being subject to the antidiscrimination provisions of the Act, *id.* at 325 & n.152. J.A. 21; see *Negotiated Rates II*, 5 I.C.C.2d at 633. Moreover, a common-carrier tariff may be limited to a particular shipper without being per se discriminatory. See *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984). With the availability of such lawful, individualized pricing options, it is highly implausible to suppose that a common carrier would quote below-tariff rates as a means to discriminate between shippers.²¹

Collectively, these regulatory changes signal a dilution of the antidiscrimination purposes that had previously animated the Act. J.A. 20-21. Against that background, the ICC properly concluded that "the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers." J.A. 21,

²¹ In addition, in *Negotiated Rates II*, the Commission drew on its experience in referred cases (such as the present one) to observe:

[T]here has been nothing in the records of the cases we have reviewed to suggest that it was the intent of the parties to establish secret, discriminatory rates. Rather, the carriers simply negotiated these rates to attract business, not with any intent to prefer one of their shippers to the disadvantage of others. Indeed, the effort was to promote and sell the carrier's service generally, not to attract a particular customer. The shipper made its determination to use the carrier's service based on the quoted rate. To permit the carrier subsequently to collect a substantially different higher rate for the past transportation service because it failed to publish the rate would be antithetical to a fundamental purpose of publishing rates—i.e., to permit shippers to choose the best rate for their shipments from among those offered by competing carriers.

5 I.C.C.2d at 631-632.

quoting *Seaboard System R.R. v. United States*, 794 F.2d at 638. In light of Congress's understanding that the ICC must have "sufficient flexibility" to realize the statute's diverse objectives, H.R. Rep. No. 1069, 96th Cong., 2d Sess. 12 (1980), the Commission's *Negotiated Rates* properly draws upon Section 10701 to implement Congress's overall goals for the motor carrier industry.²²

Moreover, to embrace the view that the statute requires collection of the tariff rate regardless of the presence of an unreasonable practice, as petitioners apparently contend (Pet. Br. 9-12 & n.6), would lead to absurd results. If the tariff-collection provision prevailed over the requirement of reasonable practices, a carrier could intentionally engage in "bait and switch" tactics by negotiating one rate, fraudulently representing that it was properly filed, and then insisting upon collection of a higher tariff rate. The requirements of Section 10761(a), which were intended to prevent intentional discrimination, cannot be construed to leave the Commission helpless to provide redress for shippers' injuries flowing from such affirmative misconduct.²³ Indeed, this Court has specifically reserved the question, "whether the filed rate doctrine applies in the face of fraudulent conduct." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 583 n.13 (1981).²⁴

²² Contrary to petitioners' view (Br. 26), the ICC is not relying on the "general purpose of the 1980 Act * * * to overcome the strict requirements and harsh results of the filed rate doctrine." The ICC is not calling into question the filed rate doctrine at all. Rather, the ICC is exercising its administrative powers over unreasonable practices pursuant to the policy directions given to it by Congress.

²³ This is particularly true since the Act makes the failure of a carrier to file and publish its rates a criminal violation. 49 U.S.C. 11903(b).

²⁴ The lower courts have generally held that the filed rate doctrine precludes courts from granting relief on the basis of a carrier's fraud. See *Consolidated Freightways Corp. v. Terry Truck, Inc.*, 612 F.2d 465 (9th Cir. 1980) (per curiam) (collecting cases); cf. *Marco Supply Co. v. AT&T Communications, Inc.*, 875 F.2d 434, 435 (4th Cir. 1989) (applying same rule to an FCC tariff). If those decisions

Whether the filed rate doctrine prevents a court from declining to enforce a tariff rate based on a finding of affirmative misconduct is not at issue here. The ICC, however, surely has discretion, in administering its express remedial authority over unreasonable practices, to devise a response to such misconduct or related unfair practices. Such a response may include, if the ICC finds it appropriate, the remedy of nonenforcement of the tariff rate. Cf. *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 352 (1982) ("The remedies for a carrier's violations of the [credit] regulations are best left to the ICC for such resolution as it thinks proper.").

The fact that *Negotiated Rates* represents a change in the ICC's interpretation of its unreasonable-practice powers does not cast doubt on the policy's validity. As the Court observed in *American Trucking Ass'n, Inc. v. Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416 (1967):

[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. * * * Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.

See also *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. at 863 ("that the agency has from time to time changed its interpretation [does not mean] that no deference should be accorded the agency's interpretation of the statute"). Provided that the Commission adequately explains its rationale, as it did here, the ICC is free to make permissible changes in the construction of its governing statute. Cf. *Atchison, T.&S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 805-809 (1973) (plurality opinion);

are correct, under petitioners' view of the law no tribunal would have the power to protect shippers from a carrier's deliberate fraud regarding its applicable rates.

Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 41-42 (1983).

In any case, *Negotiated Rates* has roots in the ICC's traditional use of its unreasonable-practice powers. For example, the ICC has long exercised its unreasonable-practice powers to prevent a carrier from enforcing a higher filed rate when a notation on a bill of lading (which was required by a tariff containing a lower rate) was inadvertently omitted. See *Standard Brands, Inc. v. Central R.R.*, 350 I.C.C. 555 (1974); cf. *Dulien Steel Products, Inc. v. New York, N.H. & H. R.R.*, 287 I.C.C. 386 (1952). These "superfluous notation" cases illustrate the longstanding exercise of the ICC's power to temper unintended consequences or inequitable results for shippers stemming from the inflexible application of tariffs. The extension of those principles to encompass the unreasonable practices found in the present case accords with the underlying purposes and express provisions of the Act.

Finally, the ICC is not barred from adopting *Negotiated Rates* simply because Congress did not anticipate the problem addressed by that policy and legislatively provide a solution. Even where the Commission has not relied on a specific statutory power, this Court has sustained the agency's authority to devise remedies needed to implement the goals set forth in the statute. In *ICC v. American Trucking Ass'ns*, 467 U.S. 354, 364-365 (1984), the ICC developed the new remedy of retroactively rejecting effective tariffs submitted in substantial violation of rate-bureau agreements. Despite the absence of express statutory authority for that remedy in the MCA or in predecessor provisions, this Court upheld it as a proper exercise of the ICC's discretionary powers because it was "directly and closely tied" to a specific statutory mandate. *Id.* at 367. In this case, *Negotiated Rates* does not spring from the ICC's implied authority to carry out the Act, but from its express responsibilities over unreasonable practices. Applying the same considerations of deference expressed in *American Trucking Ass'ns*, the ICC's de-

termination to protect shippers against shouldering the unfair costs produced by a carrier's failure to file the agreed rate is a valid exercise of agency discretion.²⁵

C. Referral To The ICC Of A Claim Under *Negotiated Rates* Is Required Under The Primary Jurisdiction Doctrine

If the Commission's *Negotiated Rates* policy reflects a permissible interpretation of its authority to proscribe unreasonable practices under 49 U.S.C. 10701(a), then the remaining question is whether a district court hearing a tariff collection action should refer to the ICC, under the primary jurisdiction doctrine, a shipper's unreasonable-practice claim under *Negotiated Rates*. Relying on this Court's primary jurisdiction decisions, the court below correctly held that referral to the ICC is required in this situation.

1. The primary jurisdiction doctrine requires that "[w]henver a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). The doctrine protects the uniform development of policy by the ICC and ensures the application of accumulated agency expertise to questions requiring intimate familiarity with conditions of the regulated industry. *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 255-

²⁵ It is unquestionably within the Commission's power to determine that the appropriate remedy for the unreasonable practices identified in *Negotiated Rates* is to apply the rate originally negotiated rather than the tariff rate. Enforcing the negotiated rate allows the shipper to retain the benefit of the bargain it has reached with the carrier, consistent with the policy of the MCA to promote a competitive marketplace in order to meet the needs of shippers. 49 U.S.C. 10101(a)(2). Indeed, in the highly competitive environment that now characterizes the industry, such a remedy is singularly appropriate, because the negotiated rate normally reflects the prevailing rate that the shipper could have obtained from competing motor carriers.

259 (1913); *United States v. Western Pacific R.R.*, 352 U.S. 59, 63-64 (1956); *ICC v. Atlantic Coast Line R.R.*, 383 U.S. 576, 580, 594 (1966); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976). The primary jurisdiction doctrine governs not only a claim that a carrier's rates are unreasonable, but also a similar claim directed at a carrier's practices. *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87 (1962) (primary jurisdiction applies to a claim that a carrier's misrouting constitutes an unreasonable practice); *Northern Pacific Ry. v. Solum*, 247 U.S. 477, 483 (1918) ("the rule which requires * * * preliminary determination of administrative questions by the Commission applies * * * to any practice of the carrier which gives rise to the application of a rate").

The foregoing principles dictate that a claim under *Negotiated Rates* must be referred to the ICC. The power to declare a practice unreasonable is entrusted to the ICC's administration; there is no residual power in a court to declare that a practice is unreasonable in violation of the statute. Cf. *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940) ("When it appeared * * * that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act."). Indeed, Congress has given statutory authority to the district courts to refer cases to the ICC in order to avail themselves of the Commission's primary jurisdiction. 28 U.S.C. 1336(b).

The considerations of uniformity and agency expertise underlying the primary jurisdiction doctrine fully apply here. The ICC's *Negotiated Rates* determinations bring to bear the agency's expertise in evaluating transportation practices. See J.A. 22. Although it is true that a case referred under *Negotiated Rates* has elements of contract law, the proper evaluation of the facts in a particular case requires familiarity with competitive conditions,

trade customs, and methods of dealing in the motor carrier industry. The ICC is by design much more fully steeped in such matters than the generalist courts.²⁶ In determining that Primary reasonably relied on Maislin to implement the negotiated rates, the ICC drew upon its experience with "other similar proceedings before the Commission involving Maislin" that encompassed "over 40 shippers and many thousands of shipments." Pet. App. 41a. Those proceedings provided the ICC with the background necessary to perceive a pattern in Maislin's dealings with shippers.

In addition, consolidating review of all unreasonable practice claims before the ICC facilitates the consistent resolution of analogous claims. Cf. *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 147-148 (1946). Finally, reference of *Negotiated Rates* cases to the Commission provides it with the raw material for evaluating the success of its efforts to apply the statutory policies to motor carrier billing practices, and to make any appropriate adjustments.²⁷

²⁶ For example, in this case the Commission had to determine whether particular rates listed in "rate sheets" provided adequate evidence of the existence of negotiated rates between Maislin and Primary. Pet. App. 37a-38a. That inquiry involved the evaluation of expert testimony, the procedures used by the parties to establish "point to point" rates, and the issue whether asserted discrepancies between the billed rates and the rate sheets undermined the contention that the rates were negotiated. In concluding that the discrepancies were not dispositive, the ICC noted that the "fuel surcharge fold-in" explained some of those discrepancies (because a one-step rounding process was used at the quotation stage, while a two-step rounding process was used at the billing stage), and that the remaining instances of one-to-two cent deviations were not significant under the circumstances. *Id.* at 39a-40a. Although courts also are capable of resolving such matters, it is readily apparent the ICC's appraisal of the facts was assisted by its knowledge of the ways of the transportation industry.

²⁷ The ICC advises us that it has currently received 237 claims under *Negotiated Rates* (including cases referred by courts and cases filed directly with the agency).

2. Relying principally on *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), petitioners contend (Br. 12-20) that even if the ICC has primary jurisdiction to adjudicate the reasonableness of carrier practices, the ICC's *Negotiated Rates* policy improperly gives a remedy for past unreasonable practices where Congress intended none to exist. Petitioners' interpretation of the statutory scheme is mistaken.

This Court has never held that the ICC lacks authority to examine the reasonableness of past motor carrier practices under 49 U.S.C. 10701(a). In *T.I.M.E.*, *supra*, the Court held by a 5-4 vote that in an undercharge action by a motor carrier, a court could not refer to the ICC the shipper's defense that the tariff rate imposed in the past was unreasonable. The Court stated that neither the Motor Carrier Act of 1935 nor the common law authorized a shipper to challenge, in postshipment litigation, the reasonableness of tariff rates previously charged by a motor carrier. Three years later, in *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), the Court distinguished *T.I.M.E.* in allowing the Commission to review past unreasonable practices. In that case, a shipper had filed suit against a carrier for unreasonable routing practices that caused the shipper to make excessive payments. The Court held that an action for misrouting survived passage of the Motor Carrier Act, and that the question whether the carrier's past routing practices were unreasonable should be referred to the ICC under its primary jurisdiction.²⁸

²⁸ *T.I.M.E.* and *Hewitt-Robins* created confusion about the exposure of motor carriers to liability for past rates and practices. As the Comptroller General informed Congress, "[p]rior to the *T.I.M.E.* decision, under established rules of law, our auditors availed the Government of the Commission's prior findings of unreasonableness of motor carrier rates and practices." The Comptroller added that the *Hewitt-Robins* decision had caused uncertainty by approving one postshipment remedy for an unreasonable carrier practice, but leaving it unclear whether other remedies for past unreasonable practices would also be acknowledged. Letter from

Congress responded to both decisions: it overruled *T.I.M.E.* by amending the Motor Carrier Act; in the process, the House Report specifically indicated approval of *Hewitt-Robins*.²⁹ The clear import of Congress's action was to authorize the Commission to determine that a carrier's past charges did not conform to the requirements of the Act, as had been ICC's established practice before *T.I.M.E.* See *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337 (1944). There can be no doubt that in acting to "restore" a procedure it thought to be previously available to shippers, and in indicating (albeit informally) approval of *Hewitt-Robins*, Congress intended to open past motor carrier rates and practices to legal challenges by shippers under the same standards of reasonableness that governed future rates and practices.

Joseph Campbell, Comptroller General of the United States, to Hon. Oren Harris (Mar. 29, 1965), reprinted in 1965 U.S. Code Cong. & Admin. News 2936-2939 (emphasis added).

²⁹ Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 (codified at 49 U.S.C. 11705(b)(3) (1982 & Supp. V 1987), 49 U.S.C. 11706(c)(2)). The amended statute authorized reparations against motor carriers for past shipments, and defined "reparations" to mean "damage resulting from charges for transportation services to the extent that the Commission * * * finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." 49 U.S.C. 304a(5) (1976). The House Committee Report confirmed the intent of the legislation to "permit a court * * * to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers and freight forwarders subject thereto. This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to aid the court by making necessary administrative determinations relating to the amount of reparations." H.R. Rep. No. 253, 89th Cong., 1st Sess. 12 (1965) (emphasis added). The Report stressed that the legislation was designed to "restore a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by the decision in the *T.I.M.E.* case." *Ibid.* The Report also stated that the provision overruling *T.I.M.E.* "would not affect in any way the right of shippers to recover damages from misrouting under the *Hewitt-Robins* doctrine." *Ibid.*

Petitioner provides no support for the view that Congress understood that it was leaving some past unreasonable practices insulated from review. Indeed, if petitioners' contention were accepted, it would call into question the well-settled practice of referring unreasonable "notation" claims to the ICC, when a shipper contends that a lower tariff rate is applicable even though the bill of lading lacked a required notation. See *Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.*, *supra*; cf. *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982).

Under the language enacted by Congress to overrule *T.I.M.E.*, a shipper may be awarded reparations for "charges for transportation services to the extent that the Commission * * * finds them to have been unjust and unreasonable." 49 U.S.C. 304a(5) (1976). The current version of that provision, reflecting the recodification of the Act in 1978, is equally encompassing. It states that a motor common carrier "is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle." 49 U.S.C. 11705(b)(3) (1982 & Supp. V 1987).³⁰ Under a natural reading of the statutory text, both of these formulations cover the type of claim defined by *Negotiated Rates*.³¹

³⁰ The 1978 reenactment was not designed to work substantive changes in the law, see note 15, *supra*.

³¹ Congress's focus in overruling *T.I.M.E.* was naturally on rates, since that was what was directly at issue in *T.I.M.E.* But we are unaware of any decision holding that an unreasonable practice that affects rates falls outside of 49 U.S.C. 11705(b)(3).

Petitioners also note (Br. 20) that, as to rail and water carriers, the Act authorizes reparations for "an act or omission of that carrier in violation of this [Act]." 49 U.S.C. 11705(b)(2). While this formulation differs from that applicable to motor carriers, petitioners are incorrect in suggesting that this difference has any significance for this case. Whether or not the reparations provision for rail and water carriers has a wider application for a violation of the Act that does not involve the imposition of rates, there is

Indeed, any narrower reading of Section 11705(b)(3) in the present context would be entirely artificial, since the shipper's core complaint in a *Negotiated Rates* case is that imposing a tariff rate is unreasonable because of the carrier's underlying conduct. While the ICC has described a *Negotiated Rates* claim as an unreasonable practice, a parallel analysis could be applied to declare that a negotiated, but unfiled rate is in certain circumstances the maximum reasonable rate. See *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 807-809 (8th Cir. 1981) (upholding an ICC order prescribing, as a maximum reasonable rate, the rate negotiated between the parties rather than the tariff rate filed by the carrier), cert. denied, 455 U.S. 907 (1982); *Burlington Northern Inc. v. United States*, 679 F.2d 915, 917 (D.C. Cir. 1982) (per curiam) (sustaining the ICC's consideration of the parties' understanding as an "important factor" in determining a maximum reasonable rate).³² In that setting, reparations or a referral to the ICC of a defense to an undercharge action would clearly be allowed even under petitioners' theory. Given that the same relief could be granted to shippers if their claim were described in terms of unreasonable rates rather than unreasonable

no basis for limiting the plain meaning of Section 11705(b)(3) as to a violation that does involve the imposition of rates—as does the violation addressed by *Negotiated Rates*.

³² The ICC's unreasonable-rate determinations have often been influenced by a course of dealing between the parties or the understanding that particular rates were applicable. See *Piedmont Mills, Inc. v. Norfolk & Western Ry.*, 296 I.C.C. 481, 485 (1955) (carrier's rate misquotation does not ordinarily support shipper's damages claim, but carrier's consistently expressed view that rates charged were applicable under published tariffs was entitled to weight); *Garson Iron & Steel Co. v. Atlantic & N.C. R.R.*, 237 I.C.C. 724, 726 (1940) (carrier intended to publish rates comparable to competitors, but made an error in filing its tariff); *Sheboygan Fruit Box Co. v. Chicago & N.W. Ry.*, 214 I.C.C. 157, 158 (1936) (carrier applied non-tariff rates through an oversight, following which parties agreed to establish those rates in a tariff).

practices, it can hardly be maintained that the referral to the ICC of a *Negotiated Rates* claim is inconsistent with the statutory scheme.³³

3. This Court has never held, in a tariff collection action by a motor carrier, that the filed rate doctrine precludes a district court from staying further judicial proceedings pending reference of a question of reasonableness to the ICC. The Fifth Circuit, however, has reached this conclusion in declining to refer a *Negotiated Rates* case to the ICC. *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d at 391-393 & n.6, citing *Southern Pacific Transportation Co. v. San Antonio*, 748 F.2d 266, 274 (5th Cir. 1984). This Court should not endorse the Fifth Circuit's rule restricting the power of courts to stay a motor carrier tariff collection action.

The *Southern Pacific* decision, on which the Fifth Circuit relied, involved considerations not pertinent here. In *Southern Pacific*, the district court had stayed enforcement of a judgment in favor of a rail carrier, based on

³³ Petitioners argue (Br. 21-23) that Section 11705(b)(3) must be read to exclude a claim under *Negotiated Rates* because the competing legislation to overrule *T.J.M.E.* that was favored by the ICC would have swept more broadly. Because the plain language of Section 11705(b)(3) reaches this case, however, it is irrelevant that some proposed bills would have gone farther. In any event, the major distinguishing feature of the bill favored by the ICC was that it would have permitted shippers the choice of filing a reparations complaint with the ICC or commencing an action in court. Under the legislation enacted by Congress, a shipper must file a complaint in court, whereupon the court refers to the Commission the issue of reasonableness. See *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403, 412-413 (1969). That distinction goes to the procedural mechanisms for administering a reparations claim, not to the substance of the claim. As the ICC explained: "While in the opinion of the Commission uniformity with respect to procedure for handling reparations under parts I, II, III, and IV of the act would have been desirable, Congress elected to provide otherwise." *Id.* at 413 (emphasis added). Congress's rejection of the ICC's preferred approach has no substantive implications for the present case.

the filed tariff rate, pending the ICC's determination in an ongoing proceeding whether the tariff rate was unreasonably high. Noting that the shipper would later have an adequate opportunity to seek reparations, the court of appeals stated that "execution of the railroads' judgment would not render the I.C.C.'s determination moot or ineffectual." 748 F.2d at 273. Consequently, compelling the shipper "to pay the filed rate immediately would not interfere with the I.C.C.'s primary jurisdiction." *Id.* at 272-273.

In contrast, the refusal to refer an unreasonable-practice claim here would interfere with the ICC's primary jurisdiction. In the typical case governed by the ICC's *Negotiated Rates* policy, the motor carrier is insolvent and hence unable to satisfy any subsequent reparation order.³⁴ In these circumstances, enforcement of the filed tariff without referral to the ICC would effectively nullify the reasonableness requirement of the statute: it would undermine the ICC's meaningful exercise of its unreasonable-practice jurisdiction and would deny the shipper an adequate remedy. For its part, the carrier can assert no offsetting equity in insisting upon prompt payment when the collection of the rates may entail an unreasonable practice and the carrier is not prepared later to reimburse the shipper. The carrier simply has no right to collect rates or to engage in practices that the ICC finds are

³⁴ *Amici Overland Express, Inc.* (Br. 16-18) and *Yaquinto* (Br. 16-17) contend that *Negotiated Rates* conflicts with the Bankruptcy Code, but neither cite any provision of the Code that remotely bears on the present issue. The obligation of a bankruptcy trustee to collect claims owed to the estate does not authorize the collection of funds in violation of public policy. Cf. 11 U.S.C. 362(b)(4) (police and regulatory exception to automatic bankruptcy stay). The ICC's determination that the carrier's claim is tainted by an unreasonable practice invalidates that claim. Nor does it undermine the Bankruptcy Code to deny the creditors of a failed carrier the fruits of the carrier's dereliction of its duty to file its negotiated rates. In short, the Bankruptcy Code provides no basis for shifting losses from the carrier's creditors to the innocent shipper.

unlawful. Cf. *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. at 520; *Pennsylvania R.R. v. United States*, 363 U.S. at 205. In that situation, where the ICC has determined to accept referrals in the midst of a collection action, a court should stay judicial proceedings pending referral of the unreasonable practice charge to the Commission. Cf. *Burlington Northern Inc. v. United States*, 459 U.S. 131, 142 (1982) (structuring court review of ICC determinations to preserve the ICC's primary jurisdiction and to protect parties unable to benefit from later reparation proceedings).³⁵

CONCLUSION

The judgment of the court of appeals should be affirmed.

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APRIL 1990

³⁵ As petitioners note (Br. 26), a bill has been introduced in the House that would, among other things, essentially codify the policy reflected in *Negotiated Rates*, H.R. 3243, 101st Cong., 1st Sess. (1989). The bill has been referred to the Committee on Public Works and Transportation, and has not been reported out of committee. We will apprise the Court of any legislative developments affecting this case.

APPENDIX

49 U.S.C. 10701 (a) provides in pertinent part:

A rate (other than a rail rate), classification, rule, or practice related to transportation or service by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

49 U.S.C. 10704 (b) (1) (1982 & Supp. V 1987) provides in pertinent part:

When the Commission decides that a rate charged or collected by—

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

.

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

49 U.S.C. 10761 (a):

Except as provided in this subtitle, a carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person,

(1a)

2a

giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

49 U.S.C. 10762(a)(1) provides in pertinent part:

A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs.

No. 89-624

Supreme Court, U.S.

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JOSEPH F. SPANIO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

SUMMARY OF ARGUMENT

The issue presented is so utterly straightforward that it is unfortunately susceptible to unnecessary complication as illustrated by the Government's arguments. The dispute giving rise to this litigation is one between a motor common carrier and a shipper contrasting the enforcement of an applicable, effective, and lawful tariff against an unfilled, negotiated rate specifically declared to be illegal by the plain language of the Interstate Commerce Act. This case has nothing to do with an unclear, ambiguous, or

silent statute, the discretionary powers of the Interstate Commerce Commission, or the ICC's primary jurisdiction. The statute clearly mandates collection of the legal and lawful tariff rate and neither the ICC nor a court has the power to subordinate a lawful tariff to a secret, illegal rate agreement of the parties.

The essential underpinning and overriding purpose of the Act is the elimination of "sweetheart" agreements. In no uncertain terms, the statute outlaws all departures from common carrier tariffs. So fundamental is this command that the Act comprehensively and exclusively addresses the remedies for failure to adhere to a duly filed, lawful tariff to ensure the integrity of a Congressionally mandated system in the public interest. These include civil and criminal penalties, a carrier duty to recover undercharges, and a shipper right to overcharges, both of which are computed from the lawful tariff rate. Congress created the ICC as its watchdog to police and enforce the statutory tariff filing and adherence requirements and granted to it the necessary powers to insist on compliance. Manifestly, Congress reserved for itself the remedies for non-observance of the tariff and left the Commission no discretion in the matter.

Against this backdrop, the Government urges that the statute implicitly authorizes a private remedy by which the ICC may relieve parties of their statutory violations and instead enforce the terms of their illegal conduct. Absent the clearest indication of the statute, it would indeed be anomalous to read the law as requiring the filing and collection of tariff rates, while simultaneously permitting the agency charged with enforcing the Act to subsequently wink at and negate these requirements.

The 1980 Motor Carrier Act indeed changed the face of trucking regulation, but it left intact common carrier tariff adherence requirements. Clearly delineated statutory provisions defined new pricing flexibility, not an unregulated free-for-all. Significantly, these new pricing freedoms are constrained by the tariff filing requirements thus reflecting their reaffirmance by the Congress.

The Commission's powers are limited. Though its primary jurisdiction enables it to determine the reasonableness of a rate or practice contained in a tariff, it has no authority to waive collection of a lawful tariff.

ARGUMENT

A. Imposition Of An Unfiled Rate Is The Antithesis Of Statutory Rate Regulation

At issue is a court's recognition of a secret rate agreement as a legal defense to an action to recover a published and filed tariff rate which the Commission examined but never found to be unlawful.¹ The Government concedes that courts may not recognize equitable defenses in such circumstances, but contends that this prohibition may be circumvented when ap-

¹ The reasonableness (lawfulness) of the tariff rates sought to be collected here is no longer controverted. Notwithstanding the submission of specific evidence on this question in the ICC proceeding, the ICC did not find the rates unreasonable in violation of the Act. Primary Steel did not seek review of the Commission's refusal to make this requested finding, 28 U.S.C. § 1336(c). It is thus jurisdictionally barred from challenging the reasonableness of the legal rates applicable to its shipments. *Burlington Northern, Inc. v. Northwestern Steel & Wire Co.*, 794 F.2d 1241 (7th Cir. 1986).

proved by the ICC.² Its argument focuses on the ICC's primary jurisdiction over motor carrier practices which it bootstraps into an asserted private remedy to avoid payment of lawful tariff charges.

As the Court's holdings³ make clear, the Government has jumped off at the wrong starting point. Primary jurisdiction cannot be employed to create a remedy which does not exist. Under the Interstate Commerce Act, there is no right to a rate other than the lawful tariff rate. *Texas & P.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Congress has provided but one remedy to a shipper aggrieved by a motor carrier's filed, applicable and effective tariff in post-shipment litigation, viz., to challenge the reasonableness of the tariff itself. 49 U.S.C. § 11705(b)(3). The Government claims that this reparations provision is sufficiently broad to also provide a remedy where the imposition of a lawful rate would be unreasonable.⁴ (Gov't. Br., p. 38). The crux of the argument is that since the ICC can declare a tariff rate unlawful under the rule of ratemaking standards of the Act, 49 U.S.C. § 10701(e), it can likewise declare unreasonable the collection of a rate which is "produced by an unreasonable practice." (Gov't. Br., p.

² Respondent Primary Steel, on the other hand, argues that courts may recognize equitable defenses (Br., p. 9).

³ See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); and *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962).

⁴ The term reparations connotes remuneration for damages incurred. Inasmuch as the tariff rate was never paid, no damage has been incurred in the quoted rate situation and reparations are not available in the ordinary or statutory sense.

24). The fatal flaw in this argument is that the quoted rate, not the tariff rate, is the product of the asserted unreasonable practice.⁵ We therefore agree that the Act does not permit enforcement of an unfiled rate produced by illegal conduct.

The Government nevertheless contends that the language of Section 11705(b)(3) should be read so that the term "rates" implicitly embraces "practices."⁶ This is indeed a curious argument since throughout the Act, and in particular Section 10701(a), the terms are consistently stated separately. Section 11705(b)(3), of course, makes no mention of damages for past motor carrier practices and plainly limits the remedy to unlawful rates. Lest there be any doubt, former Section 204a(5) of the Interstate Commerce Act, which was codified into present Section 11705(b)(3) *without substantive change*, provided:

The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 216(e) of this part, finds *them* to have been unjust and unreasonable,

⁵ No claim is made by the Government or Primary Steel that the tariff rates sought to be collected were in any way established unlawfully. Compare *I.C.C. v. American Trucking Associations*, 467 U.S. 354 (1984) authorizing a very narrow remedy where published tariff rates might be unlawfully formulated. Even under that remedy, rejected rates would be supplanted by the filed tariff rates in effect prior to the rejected tariffs.

⁶ Respondent Primary argues similarly that, following the Court's decision in *T.I.M.E.*, Congress restored to shippers "parallel remedies" in post-shipment litigation for unreasonable rates or practices. (Resp. Br., p. 28).

or unjustly discriminatory or unduly preferential or unduly prejudicial. (Emphasis added).

Congress specifically rejected legislative proposals which would have given motor carrier shippers a reparations remedy for any violation of the Act and was well aware that the motor carrier remedy was substantively narrower than that available against railroads and water carriers. (See Brief for Petitioners, pp. 19-23).⁷

Notwithstanding its assertions as to the plain meaning of Section 11705(b)(3), the Government does an about-face and argues that the Act is silent, or at least ambiguous, in that it does not specifically address unfiled negotiated rates. (Gov't. Br., pp. 22-23). The Interstate Commerce Act could not be more explicit in prohibiting secret agreements such as involved here and specifying the remedies therefor. That the Act does not provide a private remedy to a shipper allowing him to retain the fruits of his illegal bargain reflects the simple truism that one was never intended. Congress has directed the ICC to enforce the statute's tariff requirements, not eliminate them.

The Government nevertheless claims that the ICC has "fundamental authority to determine that the im-

⁷ Amazingly, *amici* National Industrial Transportation League, et al. argue that petitioners never raised below the argument that a shipper has no statutory remedy for alleged past practices. (Br., pp. 13-14). This has been the crux of the issue throughout and was argued to the ICC, the district court, and the court of appeals. (See, e.g., Record on Appeal to the Eighth Circuit at 267a-270a, 480a-483a, and Reply Brief for Appellant to the court of appeals, pp. 10-11).

position of a filed rate would involve an unreasonable practice." (Gov't. Br., pp. 19-20). Not surprisingly, no statutory authority is advanced for such a proposition. The Commission has no remedial powers to relieve shippers from paying lawfully established rates on past shipments. The ICC's authority to require motor carriers to observe reasonable rates and practices is prospective only. 49 U.S.C. § 10704(b)(1).⁸ Of course, Section 10701(a) grants no remedial power to the Commission or the courts, but serves only as an administrative criterion. *T.I.M.E., Inc. v. United States*, *supra*, 359 U.S. at 469.

The Government erroneously infers from the ICC's prescriptive authority over motor carrier practices an implicit superpower within Section 10701(a) over past practices. Petitioners do not dispute the ICC's authority to determine that a practice is unreasonable. But the Government has twisted this authority in its most unnatural sense. The Act declares unlawful and hence unreasonable, the practice of collecting and paying a rate other than the lawful rate. The Commission's so-called unreasonable practice findings consisted of a determination that Maislin and Primary negotiated a rate which Maislin failed to file in a tariff but charged in any event. At this point, the ICC and the statute diverge. Whereas the statute demands collection of the tariff charges, the ICC says to do so would be unreasonable. Plainly, if any tension exists, it is between the ICC and the statute, not within the statute itself. Reliance on the ICC's jurisdiction over

⁸ Indeed, the ICC has no authority even where it determines that a motor carrier rate is unreasonable on a past shipment. The remedy lies exclusively in the courts. 49 U.S.C. § 11706(c)(2). See also *Negotiated Rates* (JA 22).

"practices" is simply a pleading ploy. A court is empowered to determine whether a violation of the statute has occurred without the ICC's assistance. If the failure to charge and collect the filed tariff rate is a practice within the primary jurisdiction of the ICC which must be referred, *Maxwell*⁹ and its progeny were all incorrectly decided.

B. The Suggested Remedy Contravenes The Statute

Urging that the ICC-crafted remedy is consistent with the Act, the Government contends that since Section 10761(a) does not "trump" Section 10701(a) it "cannot be construed to require the collection of a rate produced by an unreasonable practice in violation of the Act." (Gov't. Br., p. 24). The rate produced by the unreasonable practice is, of course, the unfiled, negotiated rate. Moreover, Section 10761(a) does, in fact, "trump" Section 10701(a). To read into the latter section the authority asserted by the Government would destroy and render meaningless the remainder of the statute.

The Commission's authority over practices is intended to ensure compliance with the statute. Ironically, it was the ICC's failure to enforce the tariff requirements of the Act in the early 1980s which gives rise to the present undercharge litigation.¹⁰ Its

⁹ *Louisville & N.R.R.Co. v. Maxwell*, 237 U.S. 94 (1915).

¹⁰ The Government and amici suggest that the ICC was inundated with tariff filings and without sufficient resources to fulfill its statutory responsibilities. This claim has no relevance to the question before the Court. However, it should be noted that for fiscal year 1981, the amount appropriated by Congress to the ICC was the highest in the agency's history. See ICC 1988 Annual Report to Congress, p. 139, App. D. In truth, the

dereliction surely does not create a power to retroactively validate disregard of the statute.

The Government urges, without explanation, that enforcement of unfiled rates would not undermine the tariff filing requirements of the Act. (Gov't. Br., p. 24). Such a contention is nonsensical as it seems to be premised on a construction that the statute requires the filing of rates, but not their collection. The statutory requirements are unambiguous and the ICC's efforts to nullify them have been flatly rejected by the courts. See, e.g., *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986) (holding unlawful ICC's authorization of a tariff permitting unfiled, negotiated rates to govern transportation).¹¹ Just as perplexing is the claim that a shipper who pays the lawful tariff rate rather than a lower unfiled rate negotiated with other shippers could bring a claim based on discrimination. (Gov't. Br., p. 27). However, in the absence of filed rates, such a shipper would not know the rate paid by others or even be aware that he had been the victim of discrimination. Similarly, competing carriers could not challenge quoted rates as being unreasonably low and shippers could not attack them as being unreasonably high.

Thwarted at every turn by the statute itself, the Government is forced to resort to asserted equity and

ICC was on record as opposing continued motor carrier regulation and followed a chosen course of non-enforcement.

¹¹ In their zeal to defend the ICC's purported authority, *amicus* Shippers National Freight Claim Council, Inc. misrepresents in its entirety the holding in *Regular Common Carrier Conference* by asserting that the court upheld the ICC's rejection of the tariff. (See Brief, p. 17).

fairness. Congress, however, addressed these factors by requiring the filing and posting of tariffs, 49 U.S.C. § 10762, thereby affording shippers the right and duty to verify the rates charged by carriers. They are therefore conclusively presumed to have knowledge of the tariff. *Maxwell, supra*, and *Kansas City Southern Ry. v. Carl*, 227 U.S. 639, 653 (1913). Without this presumption a shipper could avoid the lawful rate by merely claiming, as here, that it was unaware of the tariff. Having the legal right to inspect a carrier's tariff, the negligent or less than diligent shipper cannot, as a matter of law or equity, claim that he reasonably relied on the carrier's representations.¹² This is a far cry from a shipper's honest but mistaken belief as to the proper interpretation of a tariff. (See Gov't. Br., p. 26). Finally, the Government's plea that carriers should not be permitted to "reap the rewards" in collecting amounts that the law requires rings hollow. Though a private shipper might be expected to advance such a claim, it is surprising to hear the Government advocate selective non-enforcement of a law which results in a shipper retaining the fruits of its illegal bargain. An individual shipper is not injured by a result which the law mandates. To the contrary, the injury has been absorbed by the thousands of shippers who paid the lawful tariff. The

¹² The generalized contention that it would be difficult for a shipper to obtain a tariff, in addition to being immaterial, is not true. The easiest method of doing so, and the method traditionally employed by responsible shippers, is to simply request a copy from the carrier. Primary Steel never even took that initial step. Beyond this, as pointed out in Petitioners' opening brief (p. 25), at the time in question tariff changes could only be implemented on 30 days' notice, more than ample time for the ICC or a tariff watching service to produce the tariff.

Act was and is designed to protect all members of the shipping public. Congress determined that the actual or potential evil posed by secret rate agreements is so repugnant to the statutory scheme as to warrant the sometime harsh results of the filed rate doctrine.

C. The MCA Of 1980 Gave The ICC Explicit Directions And Well Defined Parameters For Regulation Of The Motor Carrier Industry

Interspersed throughout the Government's brief is the argument that the Motor Carrier Act of 1980 (Pub.L. 96-296, 94 Stat. 793) "vastly changed [the] regulatory . . . environment in which the motor carrier industry operates" resulting "in today's more flexible pricing atmosphere." (Gov't. Br., pp. 6 and 9 citing *Negotiated Rates I*; see also Gov't. Br. pp. 3-5, 13-14, 25 and 28). The short answer to this contention is that, while significant statutory changes did occur as a result of the 1980 legislation, Section 10761(a) of the Act was not amended and, contrary to the Government's position, it continues to apply with equal force when determining the rights of shippers and carriers arising from motor common carrier transportation. Accepting this as an accurate statement, this Court's holding in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984), is dispositive. However, putting *Chevron* aside for the moment, in view of the Government's contentions, it is appropriate to review the legislative history underlying enactment of the MCA of 1980 to dispel the notion that Congress relaxed the requirements of Section 10761(a).¹³

¹³ We reject the contention that "[t]he filed rate doctrine . . . does not apply in this case." (Gov't. Br., p. 13). Respondent's

It is abundantly clear that Congress envisioned the MCA of 1980 to be a major revamping of the regulatory scheme under which the ICC would continue its regulation of the motor carrier industry. Numerous specific statutory changes were made that, to one degree or another, altered continued regulation of motor carriers and the competitive relationship existing between different classes of motor carriers such as common and contract carriers.¹⁴ On the subject of "more flexible pricing", Congress took what it considered to be two major steps in relaxing the Commission's jurisdiction over motor common carrier pricing practices. The House Report accompanying Public Law 96-296 provides a clear understanding of precisely what was intended. Its reference to "allowing price flexibility" is explained to refer to Sections 11 and 12 of the enacted Bill authorizing motor carriers to establish rates within a so-called zone of rate freedom and to establish reduced rates in exchange for shippers' agreements to limit carrier liability.¹⁵

Addressing the zone of rate freedom authorization, Section 10708(d), the Committee Report indicates that this provision was added to the Act "to assure more flexible downward pricing ability for existing carriers or new carriers establishing new services after July 1, 1980, for which tariffs were not filed or published in tariff form." House Report No. 96-1069, reprinted in U.S. Code Cong. & Admin. News, p. 2306. Con-

"improvisation", i.e., primary jurisdiction coupled with unreasonable practice authority, cannot negate the requirements of the filed rate doctrine.

¹⁴ See Brief for Petitioners, pp. 26-29.

¹⁵ Sections 10708(d) and 10730(b), 49 U.S.C. § 10708(d) and 10730(b).

cerning Section 10730(b), the provision applicable to limited liability rates, it was viewed as a means to increase "... the range of [price] choices available to the shipping public." *Id.*, 2307. A fair reading of the Committee Report indicates that these two additions to the Act were perceived to be the centerpiece of Congress' injection of greater pricing flexibility authority into the manner in which motor common carriers price their services. As for other ostensible changes resulting from the 1980 legislation, there were none that affected the obligations mandated by Section 10761(a) of the Act. As Congress said, "... the intent of this legislation is to overhaul outmoded and archaic regulatory mechanisms, while retaining the pluses of an industry that has worked by simply conducting itself under the 'rules of the game.' " U.S. Code Cong. & Admin. News, p. 2284. Thus, the "rules of the game" as they apply to the tariff adherence requirements of Section 10761(a) were reviewed by Congress in 1980, but they were not altered.¹⁶

The Government's brief also requires a response directed to the recast national transportation policy, 49 U.S.C. § 10101, in terms of Congress' vision of the Commission's role in continued regulation of the motor carrier industry. The relevant legislative history indicates that a degree of antagonism existed between the ICC and Congress emanating from what certain key Congressional leaders viewed as unauthorized ICC intrusions into areas reserved to the

¹⁶ As we noted in our Opening Brief, p. 19, n.27, Congress addressed and left intact Section 10761 when it added subsection (c), excluding business entertainment expenses as defined in 49 U.S.C. § 10751, from computation of a carrier's cost of service rate base.

Congress. This situation is more than apparent when one reviews the following Congressional expressions concerning the MCA of 1980 and the Commission's role in its future administration:

[I]n order to reduce the uncertainty felt by the Nation's transportation industry, the . . . Commission [is] given explicit direction for regulation of the motor carrier industry and well-defined parameters within which it may act pursuant to congressional policy; . . . the . . . Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act . . . and other legislation enacted by Congress. 94 Stat. 793.

Senator Cannon, one of the sponsors of the 1980 Act, explained:

[L]egislation is desperately needed to clarify the existing regulatory uncertainty that plagues the industry and those who care about it This bill gives specific direction to the Interstate Commerce Commission and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from the statute, but in most cases, the discretion is eliminated. 126 Cong. Rec. 7777 (1980).

Returning to the *Chevron* decision, *supra*, this Court is confronted with the two questions it announced govern a court's review of an agency's construction of the statute it administers, viz., "... whether Congress has directly spoken to the precise question at issue", and, if it has not, "... whether the agency's answer is based on a permissible construction of the

statute." *Id.*, 482. The answer provided by the Court to the first question is dispositive in this case:

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress. [footnote omitted.]

No ambiguity or uncertainty exists in the action taken by Congress in 1980. Section 10761(a) of the Act and its requirements remain unchanged. The Government would have this Court accept the proposition that since Congress did not directly reiterate the tariff adherence requirements of the Act, Sections 10701(a) and 10704(b)(1) provide the Commission with sufficient latitude to nullify the requirements of Section 10761(a). Respondent's proposition is a form of improvisation this Court rejected in *Montana-Dakota, supra* and *T.I.M.E., supra*. Moreover, it is also rejected by the plain language of the statute and it is without support in the legislative history of the MCA of 1980. *Square D Company v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986); *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266 (5th Cir. 1983).

D. The ICC Has Primary Jurisdiction Over Any Motor Carrier "Rate . . . Classification, Rule Or Practice" That Derives From A Lawful Tariff

The Government's primary jurisdiction argument contains an obvious flaw which runs directly contrary to the position it has assumed. The Government contends that a number of cases it relies on illustrate how its interpretation of the reach of Section 10701(a) of the Act "... accords with the underlying purposes and express provisions of the Act." (Gov't. Br., p.

32). A review of the cases relied on demonstrates that they were decided in complete accord with a natural construction of Section 10701(a), and not the strained construction offered in support of unfiled rates. What distinguishes each case from the instant case is the fact that they involved Commission interpretations of legal tariff provisions or determinations of legally applicable rates. They did not involve a choice between a legally applicable tariff rate and an unfiled secret rate.

Most notable among the cases relied on by the Government and the courts below throughout the course of this litigation is *Seaboard System R.R., Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986). Before addressing the specific facts presented in that case, it is important to note that the Government, in its brief to the Court, has effectively abandoned its reliance on *Seaboard*. The Government's references to it no longer reflect the credence formerly placed on that decision. (Gov't. Br., pp. 11-12, 30).

In the petitioners' opening brief it was explained that the court of appeals placed significant reliance on *Seaboard* as did the ICC. (Brief for Pet., pp. 16-18). The Commission's jurisdiction over rail and motor carrier undercharge cases was distinguished and, since *Seaboard* involved a rail carrier's action for undercharges, the Commission's authority in matters involving motor carrier tariff charges was shown to be entirely different. It is also obvious that *Seaboard* is the cornerstone of the ICC's decisions in *Negotiated Rates I* and *Negotiated Rates II*. In *Negotiated Rates I*, on the question of whether the Commission has authority in a motor carrier action for recovery of undercharges to "... consider all of the circumstan-

ces surrounding ... [the] suit", the Commission held that: "The recent *Seaboard* decision confirms that Section 10701(a) (which applies to motor as well as rail carriers) and Section 10704 gives us the authority to make this determination." (JA 16).¹⁷

The facts presented in the Commission decision¹⁸ under review in *Seaboard* indicate that the Commission was faced with a choice between two legally filed tariff rates (a single car rate versus a multiple car rate). The Commission held, *inter alia*, that the railroad's tariff "... lent itself to misinterpretation by the ordinary user." Thus, the Commission resolved the tariff's lack of clarity in favor of the shipper and required the application of the lower of the two filed rates to the shipper's traffic.

The other court and Commission decisions relied on by the Government reflect the same pattern. For example, in *Hewitt-Robins, supra*, 371 U.S. at 86,¹⁹ the choice was between one of two legally filed rates, a rate applicable over an intrastate route, and a rate applicable over an interstate route. *Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989),²⁰ involved a legally applicable filed tariff requirement calling for a "shipper load and

¹⁷ It should not go unnoticed that the Commission's reliance on Section 10704 of the Act was made with no attempt to distinguish between the difference in the authority extended to the Commission by the railroad provision (Section 10704(a)(1)) or the motor carrier provision (Section 10704(b)(1)).

¹⁸ *Buckeye Cellulose Corp. v. Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985).

¹⁹ Gov't. Br., pp. 34 and 36.

²⁰ *Id.*, p. 38.

count" notation on the bill of lading. The same factual situation was presented in *Western Transportation Co. v. Wilson and Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982),²¹ and *Standard Brands, Inc. v. Central R. Co. of N.J.*, 350 I.C.C. 555 (1974).²² Rather than further belabor the point, we briefly refer the Court to four other decisions relied on by the Government as further support for its Section 10701(a) reasonable practice-primary jurisdiction argument.²³ *Piedmont Mills, Inc. v. Norfolk & W. Ry. Co.*, 296 I.C.C. 481 (1955), involved a single factor filed tariff rate versus a combination of filed tariff rates; "A tariff, however, should be construed where practicable, so as to give effect to all of its provisions rather than in a manner which would create a conflict." 296 I.C.C. 483; *Garson Iron & Steel Co., Inc. v. Atlantic & N. C. R. Co.*, 237 I.C.C. 724 (1940), involved an applicable tariff rate found to be unreasonable to the extent it exceeded a lower inapplicable tariff rate—the railroad was authorized to waive its collection of undercharges; *Sheboygan Fruit Co. v. Chicago & N. W. Ry. Co.*, 214 I.C.C. 157 (1936), involved a filed tariff class rate versus a filed tariff commodity rate; the defendant railroad introduced no evidence in the proceeding and the Commission awarded reparations. Finally, we would not term the practice at issue in *Adams v. Mills*, 286 U.S. 397 (1932), a "billing practice" as does the Government. Rather, the Court's decision turned on the fact that an unloading service was included in the carriers' filed tariff linehaul rates and, therefore, an additional charge for unloading

²¹ Id.

²² Id., p. 32.

²³ Id., p. 22, fn. 16 and p. 39, fn. 32.

could not be applied. Shipper complainants were awarded reparations.

The point made by the foregoing decisions is that shippers' claims against common carriers are measured by the filed tariff, *Square D, supra*, are resolved before the ICC and/or courts, and if they arise from an unlawful secret rate arrangement, the shipper is without a justiciable legal right. *Montana-Dakota, supra* and *T.I.M.E., supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 89-624

In The
Supreme Court of the United States
October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL.,
Petitioners,
v.

PRIMARY STEEL, INC.,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR AMICI CURIAE MCLEAN TRUCKING
COMPANY, CHARLES COVEY, TRUSTEE FOR
UNZICKER TRUCKING, INC. AND BRUCE
HUSSEY, TRUSTEE FOR COLUMBIA NAVIGATION,
INC. IN SUPPORT OF PETITIONERS

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INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

McLean Trucking Company is a motor common carrier of property pursuant to operating authorities issued to it by the Interstate Commerce Commission. McLean Trucking Company is a debtor-in-possession under Chapter 11 of the United States Bankruptcy Code.

Charles Covey is the Trustee of Unzicker Trucking, Inc., a debtor under Chapter 7 of the United States Bankruptcy Code. Bruce Hussey is the Trustee of Columbia Navigation, Inc., a debtor under Chapter 7 of the United States Bankruptcy Code. Unzicker Trucking, Inc. and Columbia Navigation, Inc. were motor common carriers licensed by the Interstate Commerce Commission.

The above-named Amici each are liquidating assets of their respective bankruptcy estates. These assets include claims for freight charges similar to that asserted by the Petitioners herein against the Respondent. This brief is submitted in support of the Petitioners.

SUMMARY OF ARGUMENT

The sole issue herein is whether in an action to recover tariff charges pursuant to 49 U.S.C. sec. 11706(a), an unpublished rate agreement of the parties may be asserted as a defense. This issue is important because the effect of an affirmance of the court of appeals decision would be to allow shippers and carriers to completely ignore the filed tariff charges and the requirements of the Interstate Commerce Act, specifically 49 U.S.C. secs. 10761(a), 11901, 11902 and 11903.

Under the regulatory scheme adopted by Congress and embodied in the Interstate Commerce Act, motor common carriers and shippers may not deviate from the filed tariff rate under any pretext. This admittedly harsh rule of law is unwavering in its application because the Act's underlying purposes would be completely undermined by creating exceptions on a case-by-case basis

favoring the interests of individual shippers and their secret rate deals. The court below incorrectly found that a court must recognize equitable defenses where the ICC has given its blessing to secret rate agreements of the parties. Primary Steel, Inc. contends that this is a matter within the ICC's primary jurisdiction and that the trial court properly affirmed the Commission's decision.

The court below found that the ICC may employ a general policy provision of the Interstate Commerce Act to nullify the mandatory requirements of a specific provision. It found that the ICC's jurisdiction over carrier practices set forth in section 10701(a) empowers the Commission to declare the requirements of section 10761(a) unreasonable. However, section 10701(a) is a general policy section which grants the Commission no remedial power at all. Moreover, the practice found unreasonable by the Commission is the collection of lawful tariff charges. This is not a carrier practice, but a statutorily mandated requirement. 49 U.S.C. sec. 10761(a). This strict rule of law finds its genesis in the statute itself and Supreme Court construction thereof and the courts had no valid basis on which to alter it.

The efforts to cast the shadow of the ICC's jurisdiction over the district court's decision are misplaced. The question of law presented is not whether it is unreasonable to quote and charge below-tariff rates, nor whether the ICC has jurisdiction carrier over "practices". The question is whether a voluntary, mistaken, or intentional deviation from the tariff rate nullifies the requirements of 49 U.S.C. sec. 10761(a) so as to defeat a motor common carrier's right to collect its tariff charges. Neither the ICC or any district court, acting individually or in concert

with one another, have the authority to waive the requirements of section 10761(a) on the basis of agreements between the parties which result in departure from lawful tariff rates.

ARGUMENT

THE OPINION BELOW IS INCONSISTENT WITH THE INTENT OF CONGRESS AS EXPRESSED IN THE INTERSTATE COMMERCE ACT

Under the regulatory scheme adopted by Congress and embodied in the Interstate Commerce Act, motor common carriers and shippers may not deviate from the filed tariff rate under any pretext. *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). This rule of law is strictly applied because otherwise the Act's underlying purposes could be circumvented through judicially or administratively created exceptions favoring the interests of individual shippers and their secret rate deals. As this court held on the eve of the new Act to Regulate Commerce of 1887:

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to seek equality of rates as to all and to destroy favoritism, the last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination.

New Haven R. R. v. I.C.C., 200 U. S. 361, 391 (1906). Despite this long established precedent, the Court of Appeals below held that illegal, unpublished rates can be

given legal effect as long as the ICC determines the collection of the filed rate to be an "unreasonable practice". The Court of Appeals improperly found that the ICC's jurisdiction over carrier practices set forth in section 10701(a) empowers the Commission to declare the requirements of section 10761(a) unreasonable. However, section 10701(a) is only a general policy section that grants the Commission no remedial power at all. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). Moreover and fundamentally, the practice found to be unreasonable by the Commission is the collection of lawful tariff charges. This alleged "carrier practice" is actually a statutorily mandated requirement. See 49 U.S.C. sec. 10761(a). This strict rule of law derives from the statute itself and Supreme Court construction thereof, and neither the Commission nor the courts have authority to alter it.

The question of law presented is not whether it is unreasonable to quote and charge below-tariff rates, nor whether the ICC has jurisdiction over carrier "practices". The question is whether a voluntary, mistaken, or intentional deviation from a tariff rate nullifies the requirements of 49 U.S.C. sec. 10761(a) so as to defeat a motor common carrier's right and duty to collect its lawful tariff charges. Neither the ICC nor the courts, acting either individually or in concert with one another, have the authority to waive the requirements of section 10761(a) on the basis of secret agreements that result in departure from lawful tariff rates.

The Court of Appeals below incorrectly found that an equitable defense to an action at law to collect the filed rate is allowable when the ICC declared the collection of the applicable and lawful filed rate to be an unreasonable

practice. 881 F.2d 546, 548. This contention is based on the erroneous assertion that, absent a determination by a U.S. District Court that the ICC's opinion is not supported by substantial evidence, an advisory opinion by the ICC ignoring the tariff collection requirements of the Act is binding upon the reviewing court. Thus, the question presented is the correctness of the Court of Appeal's resolution of a legal issue, namely, whether or not the ICC may allow assertion of an equitable defense under the guise of an "unreasonable practice" in an action at law to collect tariff charges.

The Court of Appeals improperly held that courts must grant equitable defenses where the ICC concludes that in particular circumstances the filed rate doctrine is unfair.¹ However, the Act provides that the courts have exclusive jurisdiction over actions to recover motor carrier tariff charges. 49 U.S.C. sec. 11706(a). As discussed above, courts cannot allow equitable defenses by giving legal effect to rate agreements prohibited by statute. By the same token, the ICC has no authority to order the waiver of motor carrier undercharges, as the Commission itself concedes.² Nor does it have the authority to waive the tariff filing and adherence requirements of section 10761(a). *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). Notwithstanding these statutory prohibitions, the Court of Appeals found that the ICC may, upon referral from a court, circumvent

¹ Unless the reviewing court holds that the ICC's findings are arbitrary, capricious or not supported by substantial evidence. 881 F.2d 546, 550.

² The Court of Appeals on the other hand, erroneously suggests that the ICC has such power. 881 F.2d 546, 550.

the filed rate doctrine. However, a court and an agency cannot act in concert through the referral process to accomplish indirectly that which neither can do directly. Cf. *Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.*, 341 U.S. 246, 254 (1951). The Commission's opinion did not address an issue entrusted to its expertise, but merely decided a question that has already been determined by this Court for decades. Nevertheless, the Court of Appeals contends that the ICC, through its self-proclaimed jurisdiction over carrier practices under 49 U.S.C. sec. 10701(a), can determine that the requirements of section 10761(a) are unreasonable and should be waived. In effect, the court found that the Act may be used to defeat itself. This is not the law. The "practice" condemned by the Commission is the statutory requirement of adherence to lawful tariff charges. If Congress desired to give the Commission authority to relieve motor common carriers from the requirements of section 10761(a), it could have done so, just as it did with respect to motor contract carriers. See 49 U.S.C. sec. 10761(b) (authorizing the Commission to relieve contract carriers from the requirements of section 10761(a)). In light of the comprehensive review of this area of the law by Congress in 1980, it cannot be seriously argued that the Commission has been granted power by section 10701(a) to relieve common carriers of the requirement to strictly adhere to filed tariffs.

Part II of the Act, originally enacted as the Motor Carrier Act of 1935, did not empower the Commission or the courts to determine reasonableness of rates on past shipments or afford shippers a cause of action or defense for past violations of the Act by a carrier. *T.I.M.E., Inc.*,

supra, at 469.³ Ultimately, a compromise was struck in the 89th Congress which created for the first time a justiciable legal right to reparations against motor carriers based upon their duty to establish and maintain just, reasonable and non-discriminatory rates; however, it denied the Commission power to compel reparations and instead vested such power in the courts. Compare 49 U.S.C. sec. 10704(b)(1) with sec. 10704(b)(2).

The sole remedy of a shipper with respect to rates on past shipments is to commence a civil action against a carrier for reparations. Thus the Act affords shippers a remedy for "damages resulting from the imposition of rates for transportation or service the Commission . . . finds in violation of the Act". 49 U.S.C. sec. 11705(b)(3). Therefore the involvement of the Commission is purely ancillary to an action at law for reparations, namely to determine whether the filed tariff rates were unjust, unreasonable, discriminatory, prejudicial or preferential. Even after the Commission makes such determination, it is the exclusive prerogative of the court whether or not to follow the Commission's findings. Thus the Act, after revision in light of *T.I.M.E., Inc.*, makes clear that the shippers and carriers must look only to the filed tariff to determine the rights of the parties unless the tariff or rates contained therein are found to be unreasonable. In the matter at bar, there was no finding by the ICC that Petitioners' rates were either discriminatory or unreasonable.

³ "Language of this sort in a statute . . . creates only a 'criterion for administrative application in determining a lawful rate' rather than a 'justiciable legal right'".

The proposition that the Act permits either the Commission or a court, or both, to ratify illegal rate agreements turns the statute on its head. If true, then the ICC would have the power, through the courts, to use section 10701(a) to nullify the requirements, prohibitions, and civil and criminal sanctions provided by sections 10761(a), 11901, 11902, 11903, 11904 of the Act. Explaining the statutory scheme with respect to the filed rate doctrine, this Court has warned that "the act cannot be held to destroy itself." *Texas & P.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 358 (1907).

Sections 10761(a) and 10701(a) of the Act are not mutually exclusive. Rather, they constitute the regulatory scheme Congress believed necessary to ensure that all shippers utilizing motor common carriers pay the full tariff charge. The ICC's "remedy", on the other hand, undermines the statutory scheme by condoning special rate agreements permitting individual shippers – such as Primary Steel, Inc. – to retain the benefit of a secret rate agreement. Validation of such agreements results in discrimination against those shippers who abide by the law by paying the filed tariff rate.

The rigid requirements of the filed rate doctrine reflect the will of Congress and only that body may change the statutory mandate. *Thurston Motor Lines v. Jordan K. Rand*, 460 U.S. 533 (1983). The exceptions Congress has permitted are narrow and carefully delineated. For example, the reparations remedy provided in 49 U.S.C. secs. 11705(b)(3) and 11706(c)(2) permits challenges to the lawfulness of tariff rates on past shipments. Even then, the shipper must first pay the tariff rate before it can be challenged as unreasonable.

In no case cited by the Court of Appeals in the opinion below was an unlawful rate agreement of the parties allowed to supplant a lawful tariff rate. The Supreme Court and circuit cases cited by the court of appeals below simply stand for the proposition that the Commission can find a tariff provision unreasonable. No such finding was made in the proceeding below. Instead, the court found that an otherwise lawful tariff rate may not be collected. Moreover, in each case cited, the ultimate result was payment by the shipper of a published tariff rate, albeit a different one than that advanced by the carrier. In none of the cases cited by the court below was an unpublished, negotiated rate allowed to apply in lieu of a filed rate. Furthermore, the Court of Appeals made no attempt to reconcile the decision below with Supreme Court decisions affirming the rule of strict adherence to filed tariffs. If the Court of Appeals decision is permitted to stand, Primary Steel, Inc. will have entirely circumvented the application of legal tariff rates.

The court below ignored over eighty years of Supreme Court precedent on this question of law. This Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) the Court said:

Under the Interstate Commerce Act, the rate of the carrier duly filed is the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* [Emphasis supplied].

In *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908), the Court explained the rationale for the rigid rule of the filed rate doctrine:

If the rates (filed and published as required by law) are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

This Court has invariably applied this rule of law when it has addressed the issue of adherence to lawful common carrier rates. See, e.g., *Thurston Motor Lines v. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983) (carrier has absolute right to collect tariff charges on every shipment); *Southern Pacific Transportation v. Commercial Metals Co.*, 456 U.S. 336 (1982) (equitable defense of carrier's violation of ICC credit regulations rejected); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Louisville & N.R.R. v. Central Iron & Coal*, 265 U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interstate commerce); and *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918) (where the Court stated that a carrier's claim is, of necessity, predicated on the tariff-not an understanding with the shipper).

In *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), this Court reaffirmed the continuing validity of the filed rate doctrine and its attendant prohibition against any departures from the tariff rate citing, citing among other cases, *Maxwell*. 476 U.S. at 416-417. Although *Square D* involved an antitrust challenge to filed rates, attempts to distinguish it fail in view of this

Court's specific language stating that the filed tariff defines the rights of the shipper and carrier and cannot be varied by tort or contract. 476 U.S. 416-417.

The ICC's policy upon which the Court of Appeals relied admittedly results not from any change in the statute but rather from a less regulated atmosphere created by the Motor Carrier Act of 1980. This, however, is inconsequential for the purpose of inferring any change in the intent of Congress.⁴ As this Court stated in *Square D*, *supra*, Congress in 1980 carefully re-examined what has been settled law for nearly three quarters of a century and did not see fit to change it. Neither the Court of Appeals nor the ICC in its policy statement have pointed to any statutory provision or legislative history indicating a specific congressional intent to overturn the filed rate doctrine. Indeed, they are unable to do so for good reason. To be sure, the legislative history indicates that when Congress was overhauling the Interstate Commerce Act in 1980, ICC discretion was eliminated. H.R. No. 1069, 96th Cong. 2d Sess. reprinted at U.S. Cong. and Admin. News Service, 96th Cong. at 2292. Senator Cannon, one of the sponsors of the Motor Carrier Act of 1980 stated:

This bill gives specific direction to the Interstate Commerce Commission and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from

⁴ Indeed, when Congress carefully re-examined this area in 1980, it did so in light of Section 10761(a) and substantial precedent interpreting that section of the statute. At that time Congress left intact the filed rate requirement for common carriers.

the statute, but in most cases, the discretion is eliminated. 126 Cong. Rec. 7777 (1980).

Thus, it is clear from both the statute and the legislative history that had Congress intended to change the requirement of strict adherence to tariffs it would have done so. As the *Square D* Court noted, "harmony with the general legislative purpose is inadequate for that formidable task." 476 U.S. 420.

CONCLUSION

The Court of Appeals erred in relying on an ICC advisory decision which is contrary to law. The decision below and the ICC opinion on which it relies subverts a Congressionally fashioned regulatory scheme by allowing motor common carriers and their customers to freely negotiate prices without complying with the requirements of section 10761(a). Congress has neither eliminated nor altered the strict tariff adherence requirements of the Act for motor common carriers and until it does, equitable defenses are statutorily barred in actions at law such as the present proceedings.

Accordingly, the Court of Appeals opinion below should be reversed.

Respectfully submitted,

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MAR 2 1990

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CLERK

No. 89-624

In The
Supreme Court of the United States
October Term, 1989

MAISLIN INDUSTRIES U.S., INC., et. al.,
Petitioners,
v.

PRIMARY STEEL, INC.,
Respondent.

On Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

JOINT AMICUS CURIAE BRIEF ON BEHALF OF
ROBERT YAQUINTO JR., TRUSTEE FOR THE ESTATE
OF CARAVAN REFRIGERATED CARGO, INC., ET. AL.
IN SUPPORT OF PETITIONERS

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STATUTES INVOLVED

Section 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation service, or another device.

Section 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle . . .

INTEREST OF THE AMICI CURIAE

Each of the following parties joins as a sponsor of the within brief as *Amicus Curiae*:

1. Robert Yaquinto, Jr., Trustee for the estate of Caravan Refrigerated Cargo ("Caravan");
2. The unsecured Creditor's Committee of Manley Truck Line, Inc., ("Manley Committee");
3. The unsecured Creditor's Committee of Campbell's Sixty-Six Express, Inc. ("Campbell Committee");
4. Fredrick M. Luper, Trustee for the estate of Lee Way Holding Company ("Lee Way").

The respective interests of the *Amici Curiae* may be stated as follows:

1. Caravan currently holds a judgment for undercharges in an amount exceeding One Hundred Thousand Dollars (\$100,000.00), which judgment was unanimously affirmed by the Fifth Circuit Court of Appeals. The Defendant in that case has filed a Petition for Certiorari in this court, case number 88-1958.
2. The Manley Committee represents the unsecured creditors of the bankruptcy estate of Manley Truck Line, Inc. ("Manley"). Manley is under chapter 11 proceedings in the District of Kansas at Topeka. The creditors committee seeks to recover all assets for the estate for distribution to creditors. A large asset of Manley is the undercharge litigation now pending which includes 43 cases exceeding \$380,000.00 dollars.

INTEREST OF THE AMICI CURIAE - Continued

3. The Campbell Committee represents the unsecured creditors of Campbells Sixty-Six, Inc. ("Campbell"). Campbell is currently in chapter 11 proceedings in the United States Bankruptcy Court for the Western District of Missouri. The creditors of Campbells seek to obtain distribution on their claims, through the assets of Campbells, one of which is the undercharge litigation.

4. Fredrick M. Luper, Trustee for the estate of Leeway Holding Company is a bankrupt holding company which owned two (2) operating ICC licensed motor carrier subsidiaries, Leeway Motor Freight and Commercial Lovelace Motor Freight. Leeway has substantial assets of the estate currently pending in undercharge litigation. These assets are being gathered for the use and benefit of the creditors of the Leeway estate.

Unlike the petitioner in this case, the *Amici Curiae* have generally not had their cases referred to the Interstate Commerce Commission ("ICC"). Although the arguments are similar, and the *Amici Curiae* support the position of Maislin in this cause, Maislin has a slightly different interest in that there has been a finding of certain facts by an administrative body, upon which facts the Eighth Circuit relied in its ruling. Notwithstanding that difference, these *Amici Curiae* support Maislin's position in this matter, and suggest that the Eighth Circuit erroneously ruled in favor of the shipper in that case based upon the so-called "unreasonable practices" defense.

ARGUMENT

A. Summary of Argument

These matters present a simple, straightforward negotiated rate case. Typically, the carrier quoted and billed and their customers paid sums for interstate transportation which were not in accordance with rates duly on file with the Interstate Commerce Commission ("ICC"). Congress has preempted and exclusively regulated the field of interstate commerce pursuant to United States Constitution Article I, Section 8, Clause 3. Congress has passed statutes, from time to time, relating to transportation and those are now recodified as the Interstate Commerce Act (the "Act"), Title 49 U.S.C. Sections 10101, *et. seq.* These statutes mandate that a common carrier charge and collect only the tariff rate. This long-established, well-entrenched doctrine is often referred to as the "Filed Rate Doctrine" or "Filed Tariff Doctrine". The Filed Rate Doctrine has often been recognized by this court. In 1924 this Court explained the Filed Rate Doctrine in *Louisville and Nashville Railroad Co. v. Central Iron and Coal*, 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924). The Filed Rate Doctrine is based upon the provisions of the Interstate Commerce Act which are now found at 49 U.S.C. 10761(a) and 10762. This court has never altered its view that the Filed Rate Doctrine compels payment of the tariff charges regardless of the carrier's actions. Likewise, the statutory foundation for the Filed Rate Doctrine has never been changed. In fact, when Congress carefully reexamined this area of the law in 1980, the Filed Rate Doctrine was reenacted as Section 10761(a).

The shipping customers ("Shippers") of the *amici curiae* rely upon the decision in *Buckeye Cellulose Corp. v. L & N Railroad Co.*, 1 I.C.C.2d 767 (1985), *Aff'd sub. nom. Seaboard System Railroad v. United States*, 794 F.2d 635 (11th Cir. 1986) ("*Seaboard*"). Shippers also assert an inconsistency with this court's ruling in *United States v. Western Pacific Railroad Co.*, 353 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

Seaboard is not a case of a quoted rate versus a published rate, but instead, a case of two (2) rates which were published in a tariff, but unclear to the ordinary user. Therefore, the higher rate could not be used under the rule of construction that ambiguity or unclarity in the tariff shall result in application of the lower rate.

Likewise, this court's ruling in *Western Pacific* is not inconsistent with the Filed Rate Doctrine. This court held in *Western Pacific* that the ICC's primary jurisdiction must be invoked where technical issues are involved. In *Western Pacific*, the specific commodity being shipped was not listed in any tariff. Thus, the technical expertise of the ICC was required to determine which of two similar, though not exact, commodity descriptions should apply to those shipments.

Congress mandates collection of undercharges. Shippers cannot rely on quoted rates or avoid payment by claiming unreasonable practices. Nor can the ICC authorize non-payment, since the statutory mandate binds all parties.

B. Collection of Undercharges, as Mandated by Congress, Cannot Constitute an Unreasonable Practice.

1. Statutory Foundation

Pursuant to constitutional authority, the Congress has occupied and preempted the field of interstate commerce regulation. Congress exercised its authority by passage of the Interstate Commerce Act, including Sections 10761(a) and 10762. Those sections form the foundation of the Filed Rate Doctrine. Section 10761(a) provides as follows:

Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service is contained in a tariff that is in effect under this subchapter. *That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.* (Emphasis added.)

Section 10762 provides, in pertinent part, as follows:

... A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle.

These sections and their predecessor sections, mandate that a carrier charge and collect only those amounts which are contained in the tariff. Congress made no exception, other than contract carriage.

2. Purpose of the Act

The Act is intended to prohibit any discrimination, actual or potential. *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913, 916 (10th Cir. 1960). The Filed Rate Doctrine was adopted to prevent discrimination. *Louisville and Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915).

Shippers argue that a private, non-published rate should prevail. Shippers ignore this express purpose of the Act. Shippers want this Court to approve a private, secret rate agreement. Yet, the Act specifically prohibits such agreements. This Court should not sanction the very type of illegal, private agreement Congress forbade.

Shippers forced a carrier, now bankrupt, to accept lower rates. Shippers violated the intent of Congress. Now shippers ask for judicial approval because the carrier acted unreasonably. The unreasonable conduct, if any, was the illegal concession these large shippers extracted.

3. Authority from this Court

In *Maxwell*, this court specifically stated that "deviation from it [the tariff] is not permitted upon any pretext". 35 S.Ct. at 495. This court acknowledged that harsh results may sometimes occur, and that unfairness may seem to result, however, Congress enacted the rule of law and this court must support that rule of law.

Shippers attempt to make much of the language in *Maxwell* that the filed rate governs unless suspended or set aside. Shippers miss two (2) crucial facts. First, the pronoun "it" refers to the rate, not the practice. Shippers

do not attack the reasonableness of rate, only the reasonableness of practice. *Maxwell* recognizes the ICC's authority to adjust an unreasonably high rate, but does not sanction an illegal rate agreement. This distinction is more fully explained in Section C.I. hereinbelow.

Second, the *Maxwell* language only applies prospectively. Neither Congress nor this Court has allowed *ex post facto* changes in the filed rate. The ICC can find the rate unreasonable and require lower rates in the future. The ICC cannot arbitrarily nullify the filed rate after-the-fact.

In more recent years, this court has considered the Filed Rate Doctrine in several other contexts. For example, in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982), this court considered deviation from credit regulations as a defense to a carrier's suit for collection of its full tariff charges. This court held that *no* action on the part of the carrier could prevent collection of the tariff charges and affirmed the Filed Rate Doctrine, stating as follows:

It is perhaps appropriate to note that a carrier has not only the right but also the duty to recover its proper charges for services performed.

102 S.Ct. at 1821. Thus, the carrier's violation of credit regulations (in effect, "unreasonable" billing practices) provided no defense to the shipper. The tariff rate must be paid. Policing the carrier through administrative, civil and/or criminal penalties may be accomplished through the ICC's administrative arm. 102 S.Ct. at 1823-4.

A year later, this court considered the Filed Rate Doctrine in a slightly different context. In *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983), this court considered the jurisdictional foundation for an action to collect undercharges. This Court reasoned that an action to collect undercharges, being based upon the statutes previously cited herein, constitutes a federal question, and *not* a contract action. This fact is extremely important. This Court found that the charges are *not* a matter of contract, but instead, are a matter of law. Thus, collection of the tariff rate cannot be unreasonable. Indeed, it is the only lawful alternative. In other words, the tariff rate prevails over any "agreed" or "negotiated" rate.

Most recently, this court considered the Filed Rate Doctrine in the context of antitrust exemption in *Square D. Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau, et. al.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). In *Square D*, this court considered whether a collective rate bureau remains exempt from antitrust liability in light of the 1980 Amendments to the Act. After reviewing the longstanding notions of collective rate-making, non-discriminatory pricing and the Filed Rate Doctrine, this court concluded that the changes to the Act were not intended to liberalize, modify, annul, waive or in any way dilute or limit the long-standing interpretation of the law. This Court stated as follows:

. . . it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress

did not see fit to change it when Congress carefully reexamined this area of the law in 1980. *Petitioners have pointed to no specific statutory provision or legislative history indicating a specific Congressional intent to overturn the long-standing Keogh construction; harmony with the general legislative purpose is inadequate for that formidable task.* (emphasis added).

106 S.Ct. at 1928-29.

Shippers arguments actually conflict with this Court's ruling in *Square D*. This Court found a "statement of general legislative purpose inadequate for . . . (the) formidable task" of overruling long-settled policy. *Square D.*, 106 S.Ct. at 1928-29. Shippers arguments rely upon the ICC's self-annointed, expanded area of involvement. See, *Ex Parte MC-177 National Industrial Transportation League, Petition to Institute Rulemaking on Negotiating Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("MC-177"). That expansion relies upon nothing but a general statement of legislative purpose (49 U.S.C. 10701), and the *Seaboard* opinion. In reality, the ICC has bootstrapped its authority by choosing to declare the Filed Rate Doctrine invalid, on a case-by-case basis, pursuant to a general statement of purpose, the very activity this Court declared improper in *Square D*.

In fact, this Court's uniform interpretation of the Filed Rate Doctrine parallels Congressional intent as expressed in 1980 when the Interstate Commerce Act was revised. In debating the revisions to the Interstate Commerce Act, Congress expressed its intent as follows:

The thrust of (the new zone of rate freedom subsection) . . . is to provide for more pricing freedom and less government regulation and to

balance freer entry into the industry, freer expansion of the industry, and the additional competition that will result from other provisions of the bill. The concept, then, is to spur competition both in service and in pricing . . .

This new latitude carries with it less government involvement, *except in the area of discriminatory and predatory pricing*. In these two areas the Commission's powers remain intact. (emphasis added).

See, House Report 96-1069, 96th Cong., 2nd Sess. 12, reprinted in 1980 U.S. Code Cong. and Admin. News 2282, 2307.

4. Courts of Appeal Decisions

The Circuit Courts of Appeal consistently followed this Court's lead in applying the Filed Rate Doctrine. See, e.g., *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), *Cert. pending*, Case No. 88-1958; *Nyad Motor Freight, Inc. v. W.T. Grant Co.*, 486 F.2d 1112 (2nd Cir. 1973); *Southern Pacific Transportation Co. v. Miller Abattoir Co.*, 454 F.2d 357 (3rd Cir. 1972); *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Company*, 586 F.2d 588 (5th Cir. 1978); *Southern Pacific Transportation Co. v. San Antonio, Texas*, 748 F.2d 266 (5th Cir. 1984); *Louisville and Nashville Railroad Co. v. Mead Johnson and Company*, 737 F.2d 683 (7th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984); *Consolidated Freightways Corp. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980); *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960).

Two recent Courts of Appeal have ruled in favor of shippers, following the Eighth Circuit. *Amici Curiae* submit that those decisions, to the extent that they disallow collection of undercharges, improperly interpreted the law.

5. Seaboard Is Consistent with Amici Curiae

Shippers argue that the Eleventh Circuit ruling in *Seaboard* authorizes nonpayment due to "unreasonable practices". Shippers miss the point of *Seaboard*.

The Filed Rate Doctrine assumes that a rate is published in a tariff, which any shipper might check for its validity. This is the vehicle for providing notice. The Eleventh Circuit *explicitly* ruled in *Seaboard* that the *tariff* (not a quoted rate) was "not plain to the ordinary user". 794 F.2d at 637. Given this unclarity in the tariff, undercharges could not be collected for the time period during which the shipper and the carrier agreed that the lower of the two rates provided in the tariff should apply. See, 794 F.2d at 635 ("The controversy reflects a somewhat unclear published tariff.")

Interestingly enough, the *Seaboard* opinion does not disallow collection of the undercharges after the carrier notified the shipper that a higher rate would apply. In fact, the Eleventh Circuit affirmed a ruling in favor of the carrier for recovery of undercharges for the time period following notification that the higher rate actually applied. That decision is entirely consistent with the Filed Rate Doctrine. Once the shipper has clear notice that a higher rate was actually applicable under that tariff, the shipper had to pay the higher rate. Prior to that date, the

shipper did not have notice of the higher rate, because the tariff was "unclear".

Thus, *Seaboard* involved the application of one of two rates out of a tariff. The applicable rate could not clearly be determined. By mutual interpretation, the lower rate was used, until the carrier determined the higher rate applied. There was no unpublished, private agreement which prevailed over the filed rate. *Seaboard* did not so rule, and in fact, ruled quite to the contrary by requiring payment of the filed rate after notice was given to the shipper of a higher applicable rate.

6. Western Pacific Consistent with *Amici Curiae*

Shippers' reliance on *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) is misplaced. This Court's decision in *Western Pacific* supports the Filed Rate Doctrine and its enforcement over claims of "unreasonable practices".

The doctrine of primary jurisdiction did require referral to the ICC of certain issues in *Western Pacific*. The Court there faced a commodity (steel casings with napalm gel but lacking bursters or fuses) which did not appear in any tariff. Two similar commodities did appear in tariff schedules. To determine whether the steel casings should be rated as "incendiary bombs" or "gasoline in steel casings" required a review of the underlying costs and risk allocation factors which justified each rate. 77 S.Ct. at 168. That determination was sufficiently technical to require resort to the ICC's expertise.

On the other hand, Shippers assert that a negotiated rate should prevail over an undisputed, clear tariff. This Court found primary jurisdiction applicable in *Western Pacific* based on the technical issues. Shippers raise no technical issues. These are simply cases in which the correct rate was not charged initially.

7. Other Pertinent Cases

In the *Commercial Metals* decision cited above, this court held that the "Carrier has not only the right but also the duty to recover its proper charges for services performed." 102 S.Ct. at 1982. *Amici Curiae* seek only to comply with that duty.

In *Regular Common Carrier Conference, et. al. v. United States*, 793 F.2d 376 (D.C. Cir. 1986) the D.C. Circuit found that the Filed Rate Doctrine stands supreme. Justice Scalia, author of the opinion, stated, in pertinent part, as follows:

Even without any clear textual indication, it would be doubtful whether the waiver provision of Section 10762 could be used so expansively as to nullify this Section 10761 requirement for a "rate . . . contained in a tariff." That requirement is utterly central to the Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory (citation omitted) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates (citation omitted). The matter is placed beyond all doubt, however, by the fact that 10761 contains its own waiver provision, authorizing the Commission

to "grant relief from subsection (a) of this section" only "to contract carriers." (citation omitted.) That explicit limitation would be meaningless if the Commission could effectively dispense with the requirement for a "rate . . . contained in a tariff" by unlimited dilution of the "general tariff requirements" under Section 10762.

Regular Common Carrier Conference, 793 F.2d at 379.

Shippers would allow unlimited, after-the-fact dilution of the tariff filing requirements. If the ICC determines, on a case-by-case basis, that collection of the filed rate would be "unreasonable", then the requirement of a "rate . . . contained in a tariff" would be rendered meaningless.

Even more basic is the language quoted by Justice Scalia. Relief from the Filed Rate Doctrine can *only* be granted for contract carriage. 793 F.2d at 379, citing 49 U.S.C. 10761(b). Shippers seek authority for the ICC to grant *ex post facto* relief from the Filed Rate Doctrine, based on an ill-defined, subjective notion of reasonableness.

The lesson from *Regular Common Carriers* is quite simple. A negotiated rate cannot be enforced. The ICC cannot lawfully enforce a private agreement which varies from a published tariff. "Reasonability" is not material since all parties knew, or were legally held to know, the lawful rate from the start.

C. No Unreasonable Actions Involved Where Shipper Relies on Quoted Rate.

1. Rate Reasonableness vs. Practice Reasonableness

Shipper's analysis assumes that "rate unreasonableness" and "practice unreasonableness" are the same, and that primary jurisdiction covers both, *alike*. In fact, they are different concepts with different meanings.

In the area of rate reasonableness, there is some remedy through the ICC, in the form of an action for reparations. This Court initially held that there was no right to relief based upon reasonableness. *Time, Inc. v. U.S.*, 359 U.S. 473, 79 S.Ct. 904 (1959). In response, Congress provided a limited remedy. Public law 89-170, Sections 6 and 7, 89th Congress, 1st Sess., Sept. 6, 1965, now codified at 49 U.S.C. 11705. In regard to Motor Carriers, that remedy is expressly limited only to relief for "rates . . . in violation of this subtitle". 49 U.S.C. 11705(b)(3) (emphasis added). An action for reparations, however, is the exclusive remedy. *Mohasco Industries, Inc. v. Acme Fast Freight*, 491 F.2d 1082, 1084 (5th Cir. 1974).

Many of the cases referred to by Shippers concern referral for determination of rate reasonableness. In fact, the *Maxwell* case specifically finds that the ICC may find a rate unreasonable in stating that "shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it unless it is found by the commission to be unreasonable." (emphasis added). Grammatically speaking, the key question is the proper antecedent for the pronoun "it". The context of the sentence indicates that "it" refers to the filed "rate". In fact,

Congress directs the ICC to determine the reasonability of rates in 49 U.S.C. 10704, requiring the ICC to consider cost, income, depreciation and other relative factors to insure that a carrier can make an adequate profit and maintain its operation, thereby providing safe highways and safe transportation. None of those factors is at issue here. Virtually all of the cases cited by Shippers suffer from this infirmity.

2. "Unreasonable Practices" May Not Be Considered

In *Supreme Beef Processors, Inc. v. Robert Yaquinto, Trustee for Caravan Refrigerated Cargo, Inc.*, (In *Re Caravan Refrigerated Cargo, Inc.*), 864 F.2d 388 (5th Cir. 1989) ("Caravan") the Fifth Circuit directly addressed "unreasonable practices". That case involved facts identical to those at issue here – a quoted rate versus a published rate, and the reasonableness of "practice" in collecting those rates. The United States District Court and the Fifth Circuit Court of Appeals unanimously found that no question of unreasonable practices can deter or prevent a carrier from collecting the filed rate. In fact, the Fifth Circuit specifically held as follows:

Our decision here is an application of the same rule: A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the District Court to stay proceedings and refer the case to the Commission. (Footnote omitted) Any other decision would constitute legislation on our part; it would create an exception that swallows the

doctrine and thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact.

Caravan, at 392.

Both federal and state law consistently hold that the established tariff is the only charge that may lawfully be charged and collected, and that any agreement to the contrary is unenforceable. *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982); *In re Penn Central Transportation Co.*, 477 F.2d 841, 844 (3rd Cir.), *aff'd in part*, 414 U.S. 885, *cert. denied in part*, 414 U.S. 923 (1973). As the Third Circuit stated in *In re Penn Central*:

Under the Interstate Commerce Act, freight charges incurred pursuant to a filed tariff are accorded a legally superior status: that of a law. The only defense which can be raised to a carrier's suit for these legal charges is that the services have been paid for, that the services were not rendered, that the services were charged under an inapplicable tariff schedule, or that the rates were unreasonable.

477 F.2d at 844. None of these defenses has been raised in this case.

3. Shippers Cannot Rely on Quoted Rate

The argument of "unreasonable practices" fails for other reasons as well. Shippers ignore the fact that notice by tariff is the lynchpin of the Act. All shippers have constructive, if not actual, knowledge of the filed rate. The notion that it is reasonable to rely upon a rate which one knows to be wrong simply defies logic. Any reliance is not reasonable. In fact, such reliance is not even lawful,

since shipper and carrier are both subject to criminal penalties for entering into a rate agreement different than the published tariff. *See*, 49 U.S.C. 11903(a). In effect, shippers contend that a carrier's actions are unreasonable since they refuse to be bound by an illegal contract. An agreement as to rate which varies from the tariff is illegal and void *ab initio*.

4. Reliance on Quoted Rate is Unreasonable

While Shippers complain about undercharges, they fail to address the corollary – overcharges. Shippers continue to file for and receive payment of overcharges. If the shoe were on the other foot, Shippers would not be arguing for quoted rates to prevail. The carrier interests uniformly apply tariffs, whether the result is overcharge or undercharge.

As a question of "reasonableness," Shippers also ignore the actual contract between the parties. The negotiated rate precedes the shipment, which occurs by bill of lading. The bill of lading, as a contract between the parties, expressly incorporates the tariffs and classifications in effect. Thus, even if an illegal rate had been agreed, that agreement was superseded by the bill of lading contract. If shippers unilaterally ignore the bill of lading, they are not entitled to relief.

The Federal Respondent argues that unreasonable practices should be allowed as a defense because bankrupt carriers are not subject to reparations. Federal Respondent's Brief as *Amicus Curiae*, p.15, *Supreme Beef Processors, Inc. v. Robert Yaquinto, Jr., Trustee for Caravan*

Refrigerated Cargo, Inc., Cert. Pending, Case No. 88-1958. Whether a reparations award results in payment is irrelevant. There may be creditors of bankrupt carriers who have judgments for materials, services or goods, but payment of those judgments is not guaranteed. Further, this issue arises with ongoing carriers as well. Should the rule be different due to Bankruptcy? The policy of bankruptcy would dictate otherwise. The undercharges are assets of the bankruptcy estate. Their collection will benefit all creditors as contemplated by Title 11. To prefer Shippers, who engaged in an illegal agreement, over innocent creditors, certainly does not promote the purpose of fair and equitable distribution of assets to creditors of a bankruptcy estate.

5. Case Authority Explained

In *Seaboard System Railroad v. United States*, 794 F.2d 635 (11th Cir. 1986) the Court upheld an ICC determination of unreasonableness, and prevented collection of purported undercharges. As with most cases, however, the holding cannot be viewed in a vacuum but only in the context of its facts. As discussed hereinabove (Section B.5), the *Seaboard* case did not consider a quoted rate versus a published rate, but instead, it considered two published rates, application of which was unclear to the ordinary user. Under those circumstances, when the carrier and shipper agreed that the *lower, published* rate applied, the carrier was prevented from collecting the *higher, published* rate. *Seaboard* stands not for the proposition that a quoted rate may prevail, but only that where a tariff is unclear, and the shipper and carrier agree upon its application, unless and until notified of a different

interpretation, the carrier is held to its own interpretation of its own tariff.

A recent decision by the Seventh Circuit entitled *Carriers Traffic Service, Inc. et. al. v. Anderson, Clayton and Company, et. al.*, Case numbers 88-2697, 88-2707 and 88-3053 (7th Cir. 1989) ("*Anderson*") similarly upholds the Filed Rate Doctrine. The Seventh Circuit specifically stated that the "holding here should be construed narrowly", and should be applied only to "the circumstances of these cases". Slip opinion, p. 19-20. Even without that limitation, however, *Anderson* does not authorize the use of quoted rates under the guise of "unreasonable practices" as a defense. The Seventh Circuit ruled in *Anderson*, as it did in *Western Transportation Co. v. Wilson and Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982) on a "notation" tariff. Both cases concern a published rate, and not a quoted rate. *Anderson* concerned a tariff which required a notation on the bill of lading to indicate that the shipper had loaded and counted the goods on the truck. Everyone agreed that the shipper had, indeed, done exactly that. Simply because that notation had not been made on the bill of lading, however, the carrier sought collection of a higher, published rate. Again, this case concerned published rates, not a quoted rate versus a published rate. In *Anderson*, as the Court had done several years previously, the Court found that the notation requirement was for informational purposes, and where all parties agreed that the shipper had indeed loaded and counted as required by the tariff, the requirement of notation provided no useful purpose. Since no secret "deal" was involved (the tariff was published), policy does not require the absurd. *Anderson*, p. 15.

6. Contrast Shippers Situation with Cases Cited

The above two cases contrast sharply with the situation presented by Shippers. Shippers did not have a published rate upon which they sought to rely, but only a quoted rate. Shippers either did not check the tariff or, if they did, knowingly violated the law. Shippers do not seek determination as to the reasonableness of a published tariff, but the reasonableness of a quoted, unpublished rate. Nowhere did the Eleventh Circuit, Seventh Circuit or Fifth Circuit imply or allow, in any way, a quoted rate to prevail over a published rate.

As Justice Scalia said while on the D.C. Circuit Court of Appeals, the Filed Rate Doctrine is "utterly central to the Act", and therefore the ICC cannot "effectively dispense with the requirement for a 'rate . . . contained in a tariff' by unlimited dilution of the 'general tariff requirements under Section 10762". *RCCC*, 793 F.2d at 379.

7. "Unreasonable Practices" Constitute the Exception

Shippers suggest that the described "unreasonable practices" are rampant. The Federal Respondent cites numbers (117 referrals and 80 direct cases). How many shipments occur daily? What percentage of shipments do these constitute? Did Shippers point out that undercharge bills occur in something less than 3% of the bills of each carrier? Of course not. By exaggerating the problem, Shippers move the focus away from their own sharp practices which resulted in preferential, secret rates. Such rates are illegal. They are the very evil outlawed by the Act. Yet, Shippers now ask this Court to sanction such

rates. To do so would be unwise as policy, since Congress has declared otherwise, and legally incorrect as a matter of separation of powers.

D. ICC Has No Jurisdiction to Disallow Collection of Filed Rates.

Under the doctrine of primary jurisdiction as enunciated in *United States v. Western Pacific Railroad Co.*, 356 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956), the ICC should first review technical issues. In *Western Pacific*, the Supreme Court required the ICC to first consider which of two (2) tariff rates applied (again note the difference from this case). Only the ICC should consider whether steel casings with napalm gel but without bursters or fuses constituted "incendiary bombs" or "gasoline in steel casings". We have only a case of a quoted rate versus a published rate. Congress has expressly declared that only published rates may apply. Thus, there is no room for ICC intervention.

1. ICC Does Not Define Its Own Jurisdiction

Shippers rely heavily upon the ICC statement in MC-177. We must, however, recognize that the ICC's statement was nothing but a policy decision. A policy decision is merely advisory, and provides no precedential value. *Pacific Gas and Electric Co. v. F.P.C.*, 506 F.2d 33 (D.C. Cir. 1974). Further, the ICC as an administrative agency, is without jurisdiction to determine the scope of its own jurisdiction. *Puerto Rico Maritime Shipping Authority, et. al. v. Valley Freight Systems, Inc.*, 856 F.2d 546 (3rd Cir. 1988). The District Court, and by reference the Bankruptcy

Court, is vested with jurisdiction over actions to recover freight charges under 49 U.S.C. 11706(a). The argument that the ICC possesses authority to rule in a manner that a Court may not is simply unfounded. The Courts enforce the law. The ICC may only offer its expertise.

2. No Statutory Authority for Referral

Shippers argue that a general statement in the Interstate Commerce Act at Section 10701 implies that the ICC has authority to waive undercharges. Sections 10761(a) and 10701 both pre-existed the 1980 amendments, and survived those amendments without change. Since Congress is presumed to know the law, by not changing those sections, it must have intended no change. If this were unclear, this Court eliminated all doubt in *Square D Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau et. al.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). This Court considered the Interstate Commerce Act and the 1980 amendments to it. Specifically, a shipper argued that the 1980 amendments changed the entire structure of the Act (similar to Shippers arguments). The Supreme Court found that an attempt to change the law cannot be inferred from a statement of general purpose:

It nevertheless remains true that Congress must be presumed to be cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. Petitioners have pointed to no specific statutory provision or legislative history indicating a specific Congressional intent to overturn the long standing *Keogh*

Doctrine: Harmony with general legislative purpose is inadequate for that formidable task.

106 S.Ct. at 1928-29. Although the context was anti-trust treble damages, as outlawed by the *Keogh* Doctrine, the holding is applicable here. Shippers rely upon Section 10701, which is nothing but a statement of general legislative purpose, to overturn the long-standing, well-entrenched Filed Rate Doctrine. The ICC was given no specific direction to change the law. Congress has not changed the law. Therefore, it remains the same.

3. ICC May Direct Future Practices Only

The Federal Respondent concedes that the ICC may only prescribe practices of a carrier in the future. Brief of Federal Respondent as *Amicus Curiae*, *Supreme Beef Processors, Inc. v. Yaquinto*, p. 8, end of the first full paragraph. The statutes so limit the ICC. See, 49 U.S.C. 10704(b)(1). For infractions in the past, the Congress established a separate means of enforcement – civil and criminal penalties. 49 U.S.C. 11903(a) (the "Elkins Act").

Shippers reliance upon 49 U.S.C. 10704(b)(1) fails for another reason. The "practices" the ICC may prescribe under 10704(b)(1) are those carrier practices listed in 10702, which does not include misquotation or billing practice.

Recognizing that a remedy exists for past as well as future violations, any action to eliminate the Filed Tariff Doctrine could only undermine the anti-discriminatory provisions of the Act.

4. Intent of Congress Should Not be Thwarted

There is no need to rationalize the intent of Congress. Congress expressed its intent. That intent is one of anti-discrimination which is accomplished via the Filed Tariff Doctrine. In unique cases, such as the notation cases (where the notation serves no useful purpose) or where two (2) rates are published and one does not clearly apply, the ICC may determine which filed rate applies. This does not allow the ICC, however, to declare an unpublished rate as applicable. The tariff may be treated as if it is a statute, binding upon both the carrier and shipper. *A.T. & S.F. Ry. Co. v. Bouziden*, 307 F.2d 230, 234 (10th Cir. 1962); *Bernstein Brothers Pipe and Machinery Co. v. Denver and R.G.W.R. Co.*, 193 F.2d 441 (10th Cir. 1951). No oral concessions contrary to a tariff may be allowed. *United States v. P. Koenig Coal Company*, 270 U.S. 512. No oral contracts or agreements may supersede or vary the tariff. *Atchison, Topeka and S.F.Ry. Co. v. Robinson*, 233 U.S. 173 (1914); *T and M Transportation Co. v. S.W. Shattuck Chemical Co.*, 148 F.2d 77 (10th Cir. 1945). See also, *Miller v. Ideal Cement Co.*, 214 F.Supp. 717 (D.Wyo. 1963). No act or omission on the part of the carrier may estop it from collecting its full tariff charges. *Empire Petroleum Company v. Sinclair Pipeline Company*, 282 F.2d 913 (10th Cir. 1960); *Bernstein*, 193 F.2d 441. See also, *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982). The conduct of a carrier cannot prevent collection of the filed rate. *Bartlett-Collins Co. v. Surinam Nav. Co.*, 381 F.2d 546 (10th Cir. 1967). Referral to the ICC for declaration of "unreasonable practices" should not be allowed to enable a quoted,

unpublished rate to apply. The ICC's determination to that effect conflicts with express Congressional intent.

CONCLUSION

Shippers stop short of arguing, though clearly hint, that application of the Filed Rate Doctrine would be unfair. That may or may not be so, however, this court should not change the doctrine which has been so long established. It is "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil and Gas*, 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932), quoted in *Square D*, 106 S.Ct. at 1931.

The Filed Rate Doctrine as enacted by Congress and as affirmed by this court requires the carrier to charge and collect the file rate. No more and no less may be collected. The carrier is under a legal obligation to collect that rate. *No act or omission of the carrier* (even "unreasonable practices") can stop it from collecting the full tariff charges. *Miller v. Ideal Cement Co.*, 214 F.Supp. 717, 720, (D.Wyo.1963), citing *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960). "No oral contracts or agreements may supersede or vary the tariff." *Miller*, 214 F.Supp. at 720, citing *A.T. & S.F. Ry Co. v. Robinson*, 233 U.S. 173, 34 S.Ct. 556, 58 L.Ed. 90 (1914). Yet Petitioner seeks to vary the charges by oral agreement, after-the-fact, under the cloak of "unreasonableness". The carefully constructed regulatory environment cannot be undermined by oral agreements. That is precisely what Shippers request. But that is precisely what Congress forbade by enacting the Filed Rate Doctrine.

"The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Square D*, 106 S.Ct. at 1926, quoting Brandeis, J. in *Keogh v. Chi & N.W.R. Co.*, 260 U.S. 156, 43 S. Ct. 47, 49 (1922). Shippers' assertions that various carriers all acted "unreasonably" is nothing more than an attempted assertion of a species of tort based on misrepresentation or fraud. Decades old, unwavering precedent and statute mandate that Shipper's arguments be denied and the Eighth Circuit decision be reversed.

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,

Petitioners,

v.

PRIMARY STEEL, INC.,

Respondent.

On Petition for a Writ of Certiorari to
United States Court of Appeals
for the Eighth Circuit

**AMICUS CURIAE BRIEF OF
OVERLAND EXPRESS, INC. IN SUPPORT OF
PETITIONER MAISLIN INDUSTRIES, U.S.,
INC., ET AL.**

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26172

QUESTION PRESENTED

In an action to collect freight undercharges by a bankrupt trucking company, is the shipper bound to pay the published rate even where the ICC deems the undercharge action to be an unreasonable practice but has not found the published tariff to be an unreasonable rate?

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No. 89-624

IN THE
Supreme Court of the United States

October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,

Petitioners,

v.

PRIMARY STEEL, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

**AMICUS CURIAE BRIEF OF
OVERLAND EXPRESS, INC. IN SUPPORT OF
PETITIONER MAISLIN INDUSTRIES, U.S.,
INC., ET AL.**

**I. INTEREST OF OVERLAND EXPRESS,
INC. AND ITS OFFICIAL CREDITORS'
COMMITTEE AS AMICUS CURIAE**

Overland Express, Inc. ("Overland") and its Official Creditors' Committee (the "Committee") submit this brief in support of petitioner Maislin Industries, U.S., Inc., *et al.* ("Maislin") and respectfully request that the Court reverse the decision of the United States Court of Appeals for the Eighth Circuit. *Maislin Industries, U.S., Inc., et al. v. Primary Steel, Inc.*, 879 E.2d 400 (8th Cir. 1989). A motor common carrier, Overland filed a petition for relief under Chapter 11 of the United States Bankruptcy Code ("Bankruptcy Code"), 11 U.S.C. §101 *et seq.*, (1982 & Supp. V 1987), on May 5, 1988. Overland's bankruptcy case is pending before United States Bankruptcy Judge Frank J. Otte in the United States Bankruptcy Court for the Southern District of Indiana under case number IP88-3004-RAJ. On August 12, 1988, Overland ceased operations and thereafter began to liquidate its assets. Overland's creditors have filed over one thousand proofs of claim asserting claims totalling almost \$75,000,000.00.

To fulfill their statutory duties to maximize the estate for distribution to creditors, Overland and the Committee obtained bankruptcy court approval to employ auditors to review Overland's billings for errors and undercharges. The auditors have discovered more than \$20,000,000.00 of errors and undercharges in Overland's bills to shippers.

Pursuant to the Motor Carrier Act of 1980 (the "1980 Act"), Congress deregulated the motor carrier industry. Pub. L. No. 96-296, 94 Stat. 793 (1980) (codified in 49 U.S.C.). The 1980 Act did not change the requirement that carriers file tariffs with the Interstate Commerce Commission ("ICC"), but the ICC no longer approves carrier tariffs before they become effective. The deregulation of the trucking industry brought about drastic changes. Carriers engaged in competitive pricing and the results were dramatic. In 1987, one commentator estimated that since 1980 approximately 6,500 trucking firms have ceased

to exist.¹ Many of the 6,500 trucking firms that ceased operations filed bankruptcy. Trustees of these bankrupt carriers have sought to collect undercharges in an effort to distribute assets to creditors.² *Cf. Breman's Express Co. v. Mitchell Milling Co. (In re Breman's Express Co.)*, 92 Bankr. 636, 644 (Bankr. W.D. Pa. 1988).

In Overland's case, freight undercharges represent a significant asset which can be distributed to Overland's unsecured creditors. The filed rate doctrine is an essential part of the Interstate Commerce Act (the "Act") and has been consistently upheld by this Court. The filed rate doctrine mandates that Overland collect its undercharges. Recent pronouncements by the ICC have cast a cloud over the filed rate doctrine and created equitable defenses for shippers. Overland's attempts to collect undercharges have been impaired by the ICC and by the split of authority among bankruptcy and other federal courts across the country as to whether the filed rate doctrine remains the law. Overland's interest in this case is similar to that of the Petitioner, Maislin, although the magnitude of the undercharges in Overland's case is much greater and not all of Overland's undercharges stem from unpublished or negotiated rates.³

¹Semich, *Are death-valley days over for trucking?*, *Purchasing*, April 23, 1987, at 41.

²A recent article estimated that disputed undercharge claims may total \$100 million. MacDonald, *ICC Action Adds New Spin to Ongoing Undercharge Contest*, *Traffic Management*, July 1989, at 15.

³This Amicus Curiae Brief is filed with the consent of all parties to this action.

II. SUMMARY OF THE ARGUMENT

The filed rate doctrine is an essential part of the Act. It has been a pivotal part of the congressional scheme to regulate commerce since 1887. More than eighty years of Supreme Court interpretation of the filed rate doctrine have left a clear understanding of the law. Only published tariffs may be billed and collected. Both carriers and shippers must abide by this rule. No equitable defenses to payment of the published tariff rate exist.

Any deviation from this rule, whether by the ICC or the courts, is contrary to law. The power of the ICC to regulate carriers, including the power to prohibit unreasonable practices, does not abrogate obligations of carriers and shippers under the filed rate doctrine. Although the ICC may alter its administrative practices and policies, it must do so within the parameters of existing law. In changing its interpretations, the ICC, like the courts, is bound by rules of statutory construction. Without specific congressional enactment, the ICC may neither create equitable defenses to the filed rate doctrine nor waive the payment of published tariffs by declaring an action to collect undercharges to be an unreasonable practice. The decision of the Eighth Circuit in *Maislin* in affirming the findings of the ICC was contrary to law and should be reversed by this Court.

In cases involving negotiated rates, shippers can easily protect themselves from undercharges by requiring proof that negotiated rates have been published. When shippers fail to obtain published tariffs for shipments, they incur full liability for payment of undercharges. In the case of a bankrupt carrier, the real parties in interest in an action to collect undercharges are the creditors of the bankrupt carrier and the shipper. In these cases, equity lies with the creditors, not the negligent shipper.

III. ARGUMENT

A. THE FILED RATE DOCTRINE IS THE LAW.

1. Publication of Tariffs is Central to the Purpose of the Interstate Commerce Act.

Congressional oversight of interstate commerce is an essential function of our federal government. One of the most important purposes of the Act is the prevention of discriminatory pricing. The filed rate doctrine, 49 U.S.C. §10761, has been the primary means of enforcing the goals of Congress to achieve uniformity in the regulation of interstate commerce. In order to promote equal access to transportation for all shippers, Congress required carriers to publish their rates for respective services and prohibited discounts or rebates of any kind. The only method for a common carrier to change the rate for carrying goods was and still is to file a new tariff.

Section 10761 of the Act requires a carrier to collect the charges mandated by filed tariffs. 49 U.S.C. §10761 (1982). Section 11903 makes a carrier's failure to bill or a shipper's failure to pay in accordance with published tariffs a criminal offense. 49 U.S.C. §11903(a) (1982). This congressional mandate that goods be shipped only in accordance with published tariffs has been consistently supported by decisions of this Court, other courts, and until recently, the ICC.

It is important to note, as did the Court of Appeals for the Seventh Circuit that

Congress did not create a flexible standard for the courts to apply in accordance with the facts, equities and economic realities of the particular case . . . There is no judicial power of equitable reformation of tariffs as of ordinary contracts.

Western Transp. Co. v. Wilson & Co., 682 F.2d 1227, 1231 (7th Cir. 1982), *reh'g denied*.

Congressional intent to prohibit secret unpublished tariffs was unequivocal in the original enactment of the Act. S. Rep.

No. 46, 49th Cong., 1st Sess., 179-200 (1886). The Act has been amended numerous times, including the most recent 1980 amendments, but retains this original prohibition. 24 Stat. 380, (1887); 49 U.S.C. §10761(a) (1980). This legislative history underscores congressional intent to retain the filed rate doctrine; yet the ICC has now deemed itself empowered to override the intent of Congress.

2. This Court has Consistently Upheld the Validity of the Filed Rate Doctrine.

Beginning with *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, this Court held that Congress had clearly expressed its intention to require carriers to file tariffs and to charge shippers in accordance with the filed tariffs. 204 U.S. 426 (1907). This Court found in *Armour Packing Co. v. United States* "[the Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, that that rate to be, while in force, the only legal rate." 209 U.S. 56, 81 (1908).

The Court reiterated this principle in *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915). In *Maxwell*, this Court required a passenger to pay the published tariff in spite of the railroad's mistake in quoting a fare. This Court analogized to the transportation of goods and stated that shippers are presumed to know whether a rate is lawful. *Id.* at 98. The carrier's mistake in quoting the fare did not provide a defense to payment of the published rate. *Id.* In fact, this Court rebuked the Tennessee Supreme Court for attempting to create an equitable defense where the Act did not provide for one. *Id.* *Maxwell* clearly upholds the carrier's right and duty to charge in accordance with the filed tariff.

In *Maxwell*, this Court noted that the filed rate governs unless the ICC finds that the rate is unreasonable. There is a difference between finding that a carrier's published rate or practice is unreasonable under 49 U.S.C. §10701 and finding that a reasonable published tariff may not be collected. The Act permits the former but not the latter. In determining that the

collection of an undercharge is an unreasonable practice, the ICC cannot negate the shipper's obligation to pay the filed rate.

Equitable defenses to an action for payment of the filed rate were rejected in *Louisville & Nashville R.R. v. Central Iron & Coal Co.*, where this Court held the price of shipping goods is fixed by law and no contract can legally reduce that amount. 265 U.S. 59, 65 (1924). "[N]or could any act or omission of the carrier . . . estop or preclude it from enforcing payment of the full amount by a person liable therefor." *Id.* In *Maislin*, the Eighth Circuit Court of Appeals erred by allowing the finding of the ICC that the carrier engaged in an unreasonable practice to preclude the carrier from collecting the published rate.

Almost sixty years after the *Central Iron* decision, this Court reaffirmed the principle that bars the assertion of equitable defenses when a carrier demands payment in accordance with the published rate. *Southern Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). The carrier failed to collect all freight charges from the consignee and later sent the consignor a bill for the balance due. The consignor defended by claiming that the carrier had violated ICC regulations by failing to collect the freight charges prior to releasing the goods. The carrier conceded this omission, but claimed that its omission did not provide a defense to payment. This Court looked to the history and purpose of the credit regulations and found that the credit regulations were intended to protect carriers, not to harm them. 456 U.S. at 345. This Court noted that permitting selective defenses to payment would defeat the purposes of the Act — to prevent discriminatory rates and provide equal treatment for shippers. 456 U.S. at 346. The consignor could have protected itself from liability for freight charges by executing the nonrecourse section of the bill of lading. If courts permitted shippers to avoid payment based on credit violations then the nonrecourse clause would be meaningless. 456 U.S. at 351. Significantly, this case was decided after the 1980 Act.

The facts of *Southern Pacific* closely parallel those currently before the Court. Just as the consignor in *Southern Pacific* could have protected itself by executing the nonrecourse provi-

sions of the bill of lading, Primary Steel could have protected itself in this case by requiring Maislin to file a tariff at the agreed rate. Both shippers and carriers are obligated to verify that charges comport with a filed tariff. *Maxwell*, 237 U.S. at 98; 49 U.S.C. §§11901-11903 (1982 and Supp. V 1987). By complying with this requirement, shippers and carriers can simply and inexpensively protect themselves. In fact, attorneys for both shippers and carriers have advised shippers that, while the filed rate doctrine exists, shippers will find the costs of compliance minimal in comparison to the costs of defending undercharge claims.⁴

Recently, this Court considered the filed rate doctrine in *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). In *Square D*, shippers alleged that the rates which had been filed with the ICC constituted a violation of anti-trust laws. The carriers based their defense on the exemption from anti-trust laws under the Act and contended that the filed rates constituted lawful rates and therefore could not violate anti-trust laws. The Court cited *Keogh v. Chicago and Northwestern R.R.*, 260 U.S. 156 (1922), and noted that in *Keogh* the Court found that the ICC's approval of the carriers' rates had established the lawfulness of the rates. This Court explained that even though the ICC no longer approves rates when they are filed, the filed rates constitute lawful rates in the same manner that the rates in *Keogh* were lawful. 476 U.S. at 417.

In determining whether the *Keogh* rule was still a proper interpretation of the law in light of the Reed-Bulwinkle Act and the 1980 Act, this Court concluded that Congress had ample opportunity to reflect on the *Keogh* decision. *Id.* at 419. Congress' refusal to rewrite the law to overturn the *Keogh* decision supported the continued viability of the principle that published reasonable rates are lawful rates. *Id.* The shippers also argued that exempting carriers' rates from anti-trust laws was contrary to congressional intent to deregulate the motor car-

⁴Callari, *Shippers Seek New Law On Balance Due Bills, Traffic Management*, April 1988, at 17; *Take Care Now to Avoid Undercharge Woes, Purchasing*, October 12, 1989, at 29.

rier industry by the 1980 Act. This Court considered that position but concluded,

[I]t nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully re-examined this area of the law in 1980.

476 U.S. at 420 (footnote omitted). Since this Court presumed that Congress agreed with the *Keogh* decision, the use of lawful rates could not support an action for violation of the anti-trust laws.

The *Square D* decision is a strong precedent for reversing the Eighth Circuit in this case. This principle of statutory construction is widely supported. *See, e.g., Kelly v. Robinson*, 479 U.S. 36 (1987). The rule of law that presumes congressional knowledge and approval of prior court interpretations when statutory amendments are made applies in this case. Congress had considered and is currently considering an amendment to the Act which would alter both the filed rate doctrine and the authority of the ICC.⁵ While congressional consideration of a proposed amendment should not dictate how this Court interprets existing law, it should provide guidance as to the congressional perception of existing law.

The filed rate doctrine has been the law for more than eighty years. It has withstood judicial construction and congressional amendments, yet remains intact. Although some courts have considered it a harsh rule, the filed rate doctrine is the law until changed by Congress. In order to affirm the *Maislin* decision, this Court would have to reverse a long line of consistent statutory construction. Such a result is untenable.

⁵H.R. 3243, 101st Cong., 1st Sess. (1989), is now pending before the Surface Transportation Subcommittee of the House Committee on Public Works and Transportation of the United States House of Representatives.

3. Only Congress May Change the Filed Rate Doctrine.

In October, 1986, the ICC issued its advisory opinion in *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, Ex Parte No. MC-177 ("Negotiated Rates I") which determined that the ICC has primary jurisdiction to determine whether a carrier's collection of undercharges is an unreasonable practice under 49 U.S.C. §10701. 3 I.C.C.2d 99 (1986). This opinion was amended by the ICC in June, 1989, *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, Ex Parte No. MC-177 ("Negotiated Rates II"), 5 I.C.C.2d 623 (1989). The ICC's position in *Negotiated Rates I* and *II* ignores the rules of statutory construction and by the ICC's own admission represents a drastic reversal of prior policy.

These edicts by the ICC were not prompted by any new direction from Congress, but by the ICC's perception of changing price structures and competitiveness in the trucking industry. 3 I.C.C.2d at 104. According to the decision of this Court in *American Trucking Associations v. Atchison, Topeka, & Santa Fe R.R.*, 387 U.S. 367 (1967), an administrative agency can change its practices in light of new developments. While the ICC may have the power to regulate and to change its administrative policies within the framework of existing law, it may not avoid its duty to uphold the Act, including the filed rate doctrine. It may not prefer one section of the Act to the exclusion of another. The dramatic change espoused in *Negotiated Rates I* and *II* without corresponding change in the underlying statutes constitutes a usurpation by the ICC of congressional authority.

The *Maislin* court upheld the decision of the ICC, based on its policy as announced in *Negotiated Rates I*, finding collection of undercharges by Maislin was an unreasonable practice under 49 U.S.C. §10701 and that Primary Steel need not pay the published rate for shipments made. 879 F.2d at 400, 406.

In *Caravan Refrigerated Cargo, Inc.*, the United States Court of Appeals for the Fifth Circuit held that even if the ICC

finds that a carrier engaged in an unreasonable practice, neither the ICC nor a court has authority to prevent collection of valid published tariffs. *Supreme Beef Processors, Inc. v. Yaquinto (In re Caravan Refrigerated Cargo, Inc.)*, 864 F.2d 388, 394 (5th Cir. 1989) *reh'g and reh'g en banc denied, petition for cert. pending*, No. 88-1958. This is the better reasoned view.

While there can be no doubt the ICC is fully empowered to determine the reasonableness of carrier rates and practices under 49 U.S.C. §10701, this power does not extend to allow the ICC to permit a shipper to pay less than the published rate. Even where a negotiated rate is clearly established as in *Maislin*, the shipper may not escape its obligation under the filed rate doctrine. To hold otherwise creates a defense for the shipper without legal basis. It subverts the policy of providing equal access to transportation. It gives the shipper a cause of action for the carrier's unreasonable practice, when the Act does not contemplate one. Congress opted in the 1980 Act to retain the filed rate doctrine. Rather than create a private cause of action for carrier violations and unreasonable practices, Congress chose to give the ICC broad regulatory and enforcement powers.

The practical result of the decision by the Eighth Circuit in *Maislin* would be to allow carriers and shippers to make the filed rate doctrine a nullity by simply negotiating an unpublished rate. If the competitive pricing structure of the trucking industry warrant this, then Congress, not the ICC, must enact new laws. Until Congress changes 49 U.S.C. §10761, carriers, shippers, the ICC, and the courts must abide by the law. If an equitable defense to collection of a published tariff is to be permitted, this defense must have a statutory basis.

B. THE ICC MAY NOT USE A FINDING OF UNREASONABLE PRACTICE TO ABROGATE THE FILED RATE DOCTRINE.

1. The ICC has Limited Adjudicatory Powers.

Recently, the ICC has taken an active role in adjudicating matters pertaining to freight undercharge disputes.⁶ These cases have traditionally come before the ICC by referral from district and bankruptcy courts under the doctrine of primary jurisdiction. More recently, such actions have been commenced by petition of a shipper based on the policy announced by the ICC in *Negotiated Rates II* which authorizes adjudication by the ICC without court referral. 5 I.C.C.2d 623 (1989). Just as this Court held that mere reference to "tariff construction" is not "determinative on the jurisdictional issue," so too, should it hold that mere reference to "reasonableness" of billing practices and tariffs is not outcome determinative in this or similar cases. *United States v. Western Pac. R.R.* 352 U.S. 59, 68-69 (1956).

The ICC has limited jurisdiction and no plenary power to fashion remedies. *Southwestern Elec. Power Co. v. Burlington Northern, Inc.*, 475 F. Supp. 510, 520 (E.D. Tex. 1979). Even the ICC admits in both *Negotiated Rates I* and *II* that it has no power to grant a remedy, only to determine "reasonableness" issues:

The Commission has no authority to award damages. Only the courts can grant a remedy.

3 I.C.C.2d 99, 101 (1986).

We now see that our 'advisory opinion' language may have been a source of confusion and requires clarification. It was used only to illustrate that this agency's unreasonable practice finding in certain instances

⁶The number of cases now pending or recently decided is too great to permit citation. See Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, No. 89-64, October 16, 1989, App. D-H. In none of these cases has the ICC ruled in favor of a carrier.

may not be self-enforcing (since the courts, not the Commission, have the more narrower [sic] authority to order or deny payment of undercharges in a particular case), and would be issued only in response to a court referral of the unreasonable practice issue.

5 I.C.C.2d 623 (1989).

Yet, the ICC has created an equitable defense to the filed rate doctrine under its interpretation of 49 U.S.C. §10701 and has created a remedy for the shipper by declaring that the carrier's unreasonable practice prevents collection of the filed rate. This was the result in *Maislin*.

In light of our conclusion that negotiated rates existed, we find that it would be an unreasonable practice now to require Primary Steel to pay undercharges for the difference between the negotiated rates and the tariff rates.

Primary Steel, Inc. v. Maislin Industries, U.S., Inc., et al., No. MC-C-10961 (ICC), January 12, 1988; Appendix C to Petition for Certiorari at 44a.

Both the ICC and the *Maislin* court claim this result does not abolish the filed rate doctrine. The clear effect is to use one section of the Act (49 U.S.C. §10701) to nullify another (49 U.S.C. §10761). The tension and potential for conflicting interpretations has been noted by other courts. See, e.g., *Carriers Traffic Serv., Inc. v. Anderson Clayton & Co.*, 881 F.2d 475, 482 (7th Cir. 1989).

[A] finding of negotiated rates should not automatically signal the follow-up conclusion of unreasonable carrier practices. Such reasoning would permit shippers and carriers to avoid the filed rate doctrine simply by agreeing on a rate. The filed tariffs could largely be ignored. This line of thought takes 49 U.S.C. §§10701(a) and 10704 beyond their intended purpose and undercuts the vitality of 49 U.S.C. §10761(a), which is clearly contrary to the law.

Pongetti v. Baldor Elec. Co. (In re Robinson Truck Lines, Inc.), 89 Bankr. 584, 592 (Bankr. N.D. Miss. 1988).

This Court previously faced an attempt to create a cause of action for shippers where the Act provided none. *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959). The Court's analysis of legislative history and congressional intent where part, but not all, of the relevant portions of the Act were amended is directly applicable to this case in light of the 1980 Act. It may be that the result here will lead to future legislative action just as the Act was amended after *T.I.M.E.* See Pub. L. No. 89-170, 79 Stat. 651, 651-652 (1965). If there is to be a change; so be it. However, Congress, not the ICC or the courts, must make such a change.

2. The ICC's Opinion in *Negotiated Rates* Violates Rules of Statutory Construction.

If the goal is as the ICC suggests to "harmonize" two provisions of the Act, the usual and customary rules of statutory construction should apply. Where two parts of the same statute appear to conflict, the more specific portion controls over the more general. As one court noted, the broad rule giving the ICC the power to regulate unreasonable practices cannot control the specific rule requiring adherence to the filed rate doctrine.

Congress has given the ICC broad authority to regulate carrier practices, but Congress itself has enacted a key regulation — the rule that the filed rate controls.

Still v. Salem Carpet Mills, Inc. (In re Southwest Equipment Rental, Inc.), 103 Bankr. 908, 910 (Bankr. E.D. Tenn. 1989).

The importance of this rule of statutory construction was reaffirmed in *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S.Ct. 680 (1990). This Court refused to permit a general section of the Labor-Management Reporting and Disclosure Act of 1959 to override a specific prohibition against alienation of pension benefits contained in the Employee

Retirement Income Security Act of 1974. An exception to the prohibition where Congress had created none could not be upheld by this Court. 110 S.Ct. at 687. *Guidry* demonstrates that a policy choice made by Congress may not seem fair, but in light of clear congressional choice the courts must defer.

The ICC's use of the unreasonable practice section of the Act has given shippers a defense to the payment of filed rates when both Congress and this Court have said no defenses exist. In *Southern Pacific*, this Court refused to permit the carrier's violation of ICC credit regulations to create a defense to the payment of freight charges. This Court was concerned that permitting selective equitable defenses would abrogate the entire rule. 456 U.S. at 352. See also *Guidry*, 110 S.Ct. at 687. The ICC's unreasonable practice findings provide shippers with a method of avoiding compliance with filed tariffs. This is in violation of the clear intent of section 10761 which provides no defenses to payment of the published tariff.

The general rulemaking authority delegated by Congress to an administrative agency can never be the basis for allowing that agency to make a rule which prohibits a practice which is mandated by the same statute. *Southwestern Equipment*, 103 Bankr. at 910; see also *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986).

Another important consideration is that the 1980 Act modified the authority of the ICC to grant relief from the filed rate doctrine to contract carriers. 49 U.S.C. §10761(b) (1982). Under this provision, the ICC may grant relief from the strictures of 49 U.S.C. §10761(a) only to *contract* carriers.

Having given the ICC statutory authority to grant relief from the filed rate statute for contract carriers only, Congress must be presumed to have decided that the other changes made in the law by the 1980 Act did not justify giving the ICC the authority to alter the operation of the filed rate statute between common carriers and their customers.

Southwestern Equipment, supra at 910, citing, *In re Caravan Refrigerated Cargo*, 864 F.2d 388 (5th Cir. 1989); *Rebel Motor Freight v. Southern Beverage Co.*, 673 F.Supp. 785 (M.D.La. 1987). This distinction between common and contract carriers indicated Congress did not intend to overrule the filed rate doctrine.

A final point about congressional intent and statutory interpretation by the ICC under *Negotiated Rates II* was made in *Southwestern Equipment*. 103 Bankr. at 911. Under 49 U.S.C. §10762(d) the ICC now has authority to shorten the notice period for making a tariff effective after its date of publication from thirty days to one day.

The reason for shortening the notice period appears obvious. The period was shortened so that carriers and shippers can negotiate rates for immediate shipping and still abide by the filed rate statute.

Id. at 911. See also 49 C.F.R. §1312.4(e) (1988).

In the absence of clear congressional intent, courts and administrative agencies should be loathe to make sweeping changes in statutory interpretation. Even though the ICC may have considerable latitude to alter its policies and regulations, courts must abide by the law and enforce the filed rate doctrine under 49 U.S.C. §10761.

C. THE ICC'S OPINION IN NEGOTIATED RATES CONFLICTS WITH THE BANKRUPTCY CODE.

The basic dispute underlying the collection of a freight undercharge is the allocation of the burden for failing to comply with the law. Both the shipper and the carrier are obligated to see that tariffs are filed and abided by.

Civil and criminal penalties apply to *any person* who "knowingly offers, grants, gives, solicits, accepts, or receives" transportation services at rates less than the published tariffs. 49 U.S.C. §§11901, 11902, 11903 (1982 & Supp. V 1987). The fact that the filed rate doctrine is still an important part of the Act is

apparent in the fines and penalties that may be imposed for violations of it. Since both shippers and carriers are subject to these obligations, if tariffs are not filed or published rates are not charged and paid, who should bear the responsibility?

Most operating carriers do not attempt to collect undercharges, even for clerical errors, for fear of alienating shippers and losing business.⁷ In most cases, it is a bankruptcy trustee⁸ who discovers that published tariff rates have not been billed or paid. It is the creditors, usually unsecured creditors, who bear the economic burden of the illegal bargain between shipper and carrier.

Even if the ICC determines that a carrier has engaged in an unreasonable billing practice, the ICC lacks authority to grant a waiver of undercharges as a remedy for the shipper. In the case of a bankrupt carrier, the trustee must collect any undercharges which are due from shippers. A bankruptcy trustee is a fiduciary with respect to creditors and has a duty to maximize the bankruptcy estate. Under the Bankruptcy Code, the trustee is obligated "to collect and reduce to money the property of the estate." 11 U.S.C. §704 (Supp V 1987); 11 U.S.C. §§1106, 1107 (1982 & Supp V 1987). This is the primary obligation of the trustee. Under 11 U.S.C. §541 (1982 & Supp V 1987), a cause of action is property of the estate. As a result, the real parties in interest in most cases, including *Maislin*, are the creditors of the bankrupt carrier and the shipper. The ICC's policies in *Negotiated Rates I* and *II* fail to account for this. The ICC has allocated the burden for abiding by the filed rate doctrine entirely to the carrier. Shippers are the parties who have the most direct economic interest to protect and who can most easily prevent an undercharge claim. Shippers should not be excused from paying the published rate.

Because shippers can so easily protect themselves from undercharge claims, it is particularly inequitable to allow them

⁷Shippers do, however, collect overcharges from operating carriers.

⁸Under the Bankruptcy Code, a debtor-in-possession has the same duties and responsibilities as a trustee. 11 U.S.C. §§1107, 1108.

to reap the benefit of paying less than the filed rate, while ordinary trade creditors of the bankrupt carrier go unpaid. A shipper who allows repeated shipments, sometimes over a period of years, to be made without obtaining and verifying that the rate has been duly published does not have equity on its side. Rates may now be published on one day's notice. 49 U.S.C. §10762(d) (1982); 49 CFR §1312.4(e) (1988).

Many of the undercharge cases heard or pending in district and bankruptcy courts involve large, sophisticated shippers with considerable economic clout to negotiate favorable rates. Primary Steel was such a shipper. This case, like so many others, is not a case of one side obtaining an unfair advantage, but a case of an illicit bargain between a shipper and a carrier who both knew or should have known they were operating under an unpublished tariff. Neither party may equitably use the other's conduct or "unreasonable" practice to excuse its own failure. A shipper who does not obtain a published tariff after negotiating a rate is liable for the published rate. If equity determines the outcome in these cases, it lies with the creditors of bankrupt carriers, not with a shipper who could have easily prevented the undercharges but instead participated in the negotiation of unpublished rates and knew or should have known it was paying less than the filed rate.

IV. CONCLUSION

The difficulty with both the ICC advisory opinions in *Negotiated Rates I* and *II* and the *Maislin* decision is that they go too far. A negotiated rate is not always an unreasonable practice, nor is an action to collect undercharges. Even where a carrier engages in a practice deemed to be unreasonable, the shipper remains obligated to pay the published rate. Allowing the shipper to receive a windfall at the expense of the creditors of a bankrupt carrier places the burden for noncompliance on the wrong parties.

The question of whether the filed rate doctrine should exist in an era of deregulation is a question for Congress. The Court

cannot make policy or shape legislation; it is the judicial branch of a tripartite government. The ICC cannot change the law or reallocate the burden of noncompliance with the law. It is a creature of the executive branch designed to implement the policy choices of Congress. Only Congress has the constitutional power to alter the filed rate doctrine, whether by eliminating it or creating an equitable defense to it. Congress has not yet done this. Until Congress amends the Interstate Commerce Act, the choice for the judicial and executive branches is clear; the filed rate doctrine remains the law without exception.

For all of the foregoing reasons, Overland Express, Inc. and its Official Creditors' Committee as amicus curiae to *Maislin* pray that this Court reverse the decision of the United States Court of Appeals for the Eighth Circuit in *Maislin Industries, U.S., Inc., et al. v. Primary Steel, Inc.*

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF ONEIDA MOTOR FREIGHT, INC., MILNE
TRUCK LINES, INC., CAMPBELL 66 EXPRESS, INC.,
WEST COAST TRUCK LINES, INC., C. KENNETH STILL,
TRUSTEE, SCOTT N. BROWN, JR., TRUSTEE,
COLISEUM CARTAGE COMPANY f/k/a PACE-SETTER
TRANSPORTATION COMPANY, FELDSPAR TRUCKING
COMPANY, INC., STEPHEN K. YODER, TRUSTEE,
BARRY S. SCHERMER, TRUSTEE, JAMES G. DUFFY,
TRUSTEE, LANGDON M. COOPER, TRUSTEE, SANFORD
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BRUCE H. LEVITT, TRUSTEE AS AMICI CURIAE
IN SUPPORT OF PETITIONERS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-624

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,
: v.
PRIMARY STEEL, INC.,
Respondent.

On Writ of Certiorari to the United States
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WEST COAST TRUCK LINES, INC., C. KENNETH STILL,
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BARRY S. SCHERMER, TRUSTEE, JAMES G. DUFFY,
TRUSTEE, LANGDON M. COOPER, TRUSTEE, SANFORD
I. FELD, TRUSTEE, WILLIAM J. HUNT, TRUSTEE, AND
BRUCE H. LEVITT, TRUSTEE AS AMICI CURIAE
IN SUPPORT OF PETITIONERS

The organizations and individuals listed above respectfully file this brief as amici curiae in support of Petitioners. Written consent has been obtained from counsel for Petitioners, Respondent and the Solicitor General for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF AMICI CURIAE

Petitioners, Respondent and various Amici filing briefs in this case agree on one thing—the undercharge issue reflected in this proceeding and hundreds of other court proceedings is the result of unbridled competition among regulated motor common carriers following enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, July 1, 1980. That legislation accomplished major regulatory reform with a general purpose of increasing competition, efficiency, and economy within the motor carrier industry.¹ At the same time, Congress emphasized the need for continued regulation of the motor carrier industry and admonished the Interstate Commerce Commission (“ICC”) “to stay within the powers specifically vested in it by the revised law.”² As pertinent, entry and rate regulation were scrutinized and carefully revised to provide carriers with greater flexibility within the framework of the law.

The economic forces of supply and demand became operative and carriers began, as hoped, to discount their prices to obtain or retain market share. Some carriers were unable to survive as discounting escalated and for this and undoubtedly other reasons, motor carrier bankruptcies began to mushroom in the early 1980’s. In an effort to marshal the assets of defunct motor carriers trustees and auditors began sifting through carrier accounts and discovered that many rates negotiated and billed by carriers, for whatever reason, were never published in tariffs on file with the ICC as required by law, 49 U.S.C. Section 10761(a). Properly viewed as monies lawfully due to their estates, trustees commenced actions to recover the difference between the amounts previously received by the carriers and the amounts lawfully due under the applicable tariffs.

¹ See House Report No. 96-1069, June 3, 1980, p. 3, reproduced in 1980 U.S. Cong. and Admin. News Service, at p. 2285.

² *Id.*, p. 2293.

The issue, and therefore the controversy, before the Court is whether Congress has given the ICC the power to declare a carrier’s failure to file an agreed upon (“negotiated”) rate, an unreasonable carrier practice which could then be used by a shipper as a defense to the carrier’s or its successor-in-interest’s collection action for the filed rate charges.

For over eighty years, this Court and the ICC have agreed that there is no “unreasonable practice” or equitable defense to the collection of the filed tariff charges. However, in 1986 the ICC changed its “policy” with respect to undercharges, from a declaration that it lacks jurisdiction to make an “unreasonable practice” finding in a motor carrier undercharge case, to now asserting that it has the power to declare that a shipper/carrier unfiled rate agreement takes precedence over the carrier’s filed rates. This dramatic policy shift (admittedly without clear congressional approval) has resulted in divergent court opinions.

Many courts have rejected the ICC’s new found “unreasonable practices” jurisdiction finding it repugnant to the antidiscrimination purposes of the Interstate Commerce Act and have, therefore, rejected the shipper’s claim of a negotiated rate as providing a defense to the carrier’s collection of the filed rate. However, many other courts have approved of the ICC’s suggestion that it alone, under the doctrine of primary jurisdiction, can review undercharge cases, and through this review, provide shippers with an equitable defense to the collection of the filed rate charges. In order to resolve the uncertainty caused by the ICC’s negotiated rate policy statements, this Court granted certiorari of the instant action.

The amici joining in this brief represent motor carriers either in liquidation outside of bankruptcy; Milne Truck Lines, Inc. and Feldspar Trucking Company, Inc.; Chapter 11 Debtors-In-Possession; Oneida Motor Freight,

Inc., Campbell 66 Express, Inc., West Coast Truck Lines, Inc., Coliseum Cartage Company f/k/a/ Pacesetter Transportation Company; or Chapter 7 Trustees of bankrupt motor carriers; C. Kenneth Still, Trustee for Southwest Equipment Rental d/b/a Southwest Motor Freight, Scott N. Brown, Jr., Trustee for Express Transportation Company, Inc., Stephen K. Yoder, Trustee for Suburban Motor Freight, Inc., James G. Duffy, Trustee for Canny Trucking Co., Inc., Langdon M. Cooper, Trustee for Carolina Motor Express, Inc., Sanford I. Feld, Trustee for Brinke Transportation Company, Inc., William J. Hunt, Trustee for Ritter Transportation, Inc., Bruce H. Levitt, Trustee for Jayne's Motor Freight, Inc. and Barry S. Schermer, Trustee for Orscheln Brothers Truck Lines, Inc. These carrier interests have presently pending cases throughout the United States involving freight undercharge disputes similar to that which forms the basis of Maislin Industries' claim against Primary Steel. In addition, many of these carrier interests have cases pending in various Circuit Courts of Appeals.³

³ First Circuit, *Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. v. Transtop Inc.*, No. 89-1662, (argued 11/7/89); Second Circuit, *Delta Traffic Service and Oneida Motor Freight, Inc. v. Appco Paper and Plastic Corp.*, No. 88-9057, decided January 4, 1990, suggestion for rehearing en banc filed; Fourth Circuit, *Langdon M. Cooper, Trustee for Carolina Motor Express, Inc. v. Delaware Valley Shippers, et al.*, No. 89-3259 and Consolidated Nos. 89-3261 and 89-3262, (argued 12/7/89); Seventh Circuit, *Orscheln Bros. Truck Lines, Inc., et al. v. Zenith Electric Corp. and ICC*, No. 88-1261 and Consolidated Nos. 89-1329 and 89-1330, (argued 1/10/90); Ninth Circuit, *Delta Traffic Service and West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, No. 89-35115 and Consolidated Nos. 89-35121 and 89-35167, decided January 4, 1990, suggestion for rehearing en banc filed; mandate stayed; Eleventh Circuit, *Feldspar Trucking Company, Inc. v. Greater Atlanta Shippers Assn., Inc.*, No. 89-8450, (argued 1/25/90).

SUMMARY OF ARGUMENT

The Eighth Circuit in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989) was incorrect in finding that the Plaintiff Maislin should not be awarded its claim for undercharges based upon the difference between the higher filed tariff rates and the lower "negotiated" rates. The filed rate doctrine as codified at 49 U.S.C. Section 10761(a) has long required the strict enforcement of tariffs. Contrary to the decision by the Eighth Circuit, the Motor Carrier Act of 1980 did not relieve a carrier's duty to charge and a shipper's obligation to pay the filed tariff rate. The fact that the provisions of 49 U.S.C. Section 10761(a) were untouched by Congress despite extensive revision to other parts of the statute strongly suggests Congressional approval of the filed rate doctrine. Any action by the ICC to abrogate this Congressional policy, even under the guise of its unreasonable practice jurisdiction, is contrary to its statutory authority.

Moreover, this Court has upheld the strength and vitality of the provisions of 49 U.S.C. Section 10761(a) since the enactment of the Motor Carrier Act of 1980.

ARGUMENT

THE DECISION BY THE EIGHTH CIRCUIT IS INCONSISTENT WITH THE STATUTORY PURPOSE AND LEGAL PRECEDENT ENFORCING THE FILED RATE DOCTRINE

A. This Court Has Consistently Applied The Filed Rate Doctrine And Has Rejected Attempts To Find Exceptions To The Rule

The Eighth Circuit's decision adopting the ICC findings and dismissing the undercharges claimed owed incorrectly interprets or ignores established Supreme Court precedent. The Supreme Court has consistently held that carriers subject to the Interstate Commerce

Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (emphasis supplied) this Court said:

Under the Interstate Commerce Act, the rate of the carrier duly filed is the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. *Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.* This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

In *Armour Packing Co. v. U.S.*, 209 U.S. 56, 81 (1908), this Court explained the rationale for the rigid rule of the filed rate doctrine:

If the rates [filed and published as required by law] are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

This Court has applied this rule of law every time it has addressed the issue of adherence to lawful common carrier rates including those arising in the post Motor Carrier Act of 1980 era. In *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) this Court stated:

A carrier's claim is, of necessity, predicated on the tariff—not an understanding with the shipper.

In *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 352 (1982) (citation omitted) the carrier's violation of the credit regulations did not act to overcome the time honored maxim that:

no act or omission of the carrier (except the running of the statute of limitations) [will] estop or preclude it from enforcing payment of the full amount by a person liable therefor.

See also *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-85, *reh'g denied*, 308 U.S. 631 (1939); *Louisville & Nashville R. Co. v. Central Iron & Coal*, 265 U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interstate commerce); and *Louisville & Nashville R. Co. v. Rice*, 247 U.S. 201, 202 (1918).

Not only has this Court consistently applied the filed rate doctrine, but the ICC has been held to be without statutory authority to waive the requirements of 49 U.S.C. Section 10761(a). As Justice Scalia stated in *R.C.C.C. v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986):

That requirement [for a rate to be contained in a tariff] is utterly essential to the Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, *see* 49 U.S.C. Sections 10701 and 10741(b) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates, *see* 49 U.S.C. Sections 10708(a)(1) & 11701(a).

This is further evidenced in the ICC's two policy statements: *National Industrial Transportation League—Petition to Institute Rulemaking On Negotiated Motor Common Carrier Rates, Ex Parte No. MC-177*, 3 I.C.C. 2d 99, (1986) ("Negotiated Rates I") and *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, Ex Parte No. MC-177*, 5 I.C.C. 2d 623 (1989) ("Negotiated Rates II") wherein the ICC has concurred that it has no authority to order the waiver of undercharges. *Negotiated Rates I*, 3 I.C.C. 2d at 102. *Negotiated Rates II*, 5 I.C.C. 2d at 625.

As recently as 1986 this Court reaffirmed the continued vitality of the filed rate doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). In *Square D*, this Court, construing the interstate commerce law subsequent to the Motor Carrier Act of 1980, quoted with approval from *Keogh v. Chicago & North Western R. Co.*, 260 U.S. 156 (1922), stated:

The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. [citation omitted]. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.

Square D, *supra*, 476 U.S. at 416-17. In *Square D*, the petitioner asserted that the pro-competitive policy of the Motor Carrier Act of 1980 would be furthered by the elimination of the antitrust exemption in *Keogh*. In response the Court stated:

[W]e may assume that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy—but it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. Petitioners have pointed to no specific statutory provision or legislative history indicating a specific Congressional intention to overturn the longstanding *Keogh* construction; harmony with the general legislative purpose is inadequate for that formidable task.

Id. at 420.

Clearly, this Court has a wealth of precedent to support the continued strength and viability of the filed rate doctrine as embodied in 49 U.S.C. Section 10761(a). It is a doctrine that is deeply woven into our national transportation framework and it is the cornerstone of the Interstate Commerce Act's anti-discrimination purpose.

B. The Congressional Policy Of Anti-Discrimination And Strict Enforcement Of Tariffs Has Remained Unchanged Despite Extensive Changes In Other Sections Of The Statute

Respondent and the ICC believe that the Transportation Policy codified at 49 U.S.C. Section 10101 provides authority to deem the collection of the filed rate an unreasonable practice when confronted with a negotiated unfilled rate. The ICC's perceived authority is alleged to come from 49 U.S.C. Section 10101(a)(2), which provides that motor carrier regulation is "to promote competitive and efficient transportation services," in order to achieve, among other things, "a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public." However, this broad policy statement does not provide the authority the ICC claims. On the contrary, the language contained in 49 U.S.C. Section 10101(a)(1)(D) clearly states that it is also the policy of Congress "to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices." This is not a departure from past policy, but a reaffirmation of Congress' continued commitment to eliminate rate discrimination. As this Court keenly noted in *Commercial Metals; supra*:

This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act—to achieve uniformity in freight transportation charges, and thereby to eliminate the discrimination and favoritism that had plagued the railroad industry in the late 19th Century.

456 U.S. at 344 (citation omitted). Therefore, this reliance by the ICC and Respondent on the "changed national transportation policy" is a fiction created to allow rate discrimination by excusing shipper from paying the full tariff rate.

Admittedly, Congress did make extensive changes in the regulation of motor carriers in the Motor Carrier Act of 1980. However, Congress spoke as loudly by the changes it did not make. Despite major revisions in related sections, Congress left untouched the requirement of strict enforcement of tariffs contained in 49 U.S.C. Section 10761(a), presumably with full knowledge of the unwavering judicial interpretation of this provision. The legislative history reinforces this view. Senator Cannon, one of the sponsors of the 1980 Act, explained: "This bill gives specific direction to the Interstate Commerce Commission and we expect those directions to be followed. Where the Commission is to be given more discretion, it is clear from the statute, but in most cases, the discretion is eliminated." 126 Cong. Rec. 7777 (1980) (remarks of Senator Cannon). Moreover, the House Committee on Public Works and Transportation specifically warned the ICC to carefully follow the statute in any regulatory initiatives. The Committee stated:

In revising the statute, Congress also intends to give the Interstate Commerce Commission explicit direction for the regulation of the motor carrier industry and to ease that industry's uncertainty about the future of regulation by the Commission. *The Commission is admonished to stay within the powers specifically vested in it by the revised law.*

H.R. Rep. No. 96-1069, 96th Cong. 2d Sess., at 10-11 (1980) (emphasis supplied). This admonishment was fueled by concerns that without strict congressional leadership on deregulation, the ICC would begin a "*de facto*" deregulation at the administrative level. 126 Cong. Rec. H. 5352 (daily ed. June 19, 1980) (remarks

of Rep. Shuster); 126 Cong. Rec. H. 5345-46 (daily ed. June 19, 1980) (remarks of Rep. Harsha).

While it is true that Congress sought to increase competition in the motor carrier industry, it never intended to restrict the power of the Act regarding discrimination. H.R. Rep. No. 96-1069 at 25. It is apparent upon examination of the legislative history that 49 U.S.C. Section 10761(a) was not inadvertently left on the books, but rather that Congress intended to continue the requirements of public filing and strict enforcement of tariffs by the ICC and the courts. Accordingly, the fact that Congress made major changes in the Interstate Commerce Act while leaving 49 U.S.C. Section 10761(a) intact makes any action by the ICC to relax its requirements beyond the ICC's statutory authority.

Nowhere is congressional control over the filed rate doctrine more patently evident than in the household goods provision. See 49 U.S.C. Section 10735. Congress allowed motor common carriers to "establish a rate for the transportation of household goods which is based on the carrier's written, binding estimate of charges for providing such transportation." 49 U.S.C. Section 10735 (a)(1) (emphasis supplied). Here, Congress specifically provided an exception for a motor common carrier to allow a negotiated unfiled rate to be binding upon the parties.

Congressional intent to leave the filed rate doctrine intact is further evidenced by the fact that the Motor Carrier Act of 1980 retained in the filed rate statute specific authority for the ICC to grant relief from the filed rate requirement *only* for contract carriers, *not* for common carriers. 49 U.S.C. Section 10761(b). The fact Congress continued to limit the ICC's authority to grant relief from the filed rate statute for contract carriers only, highlights the ICC's lack of authority to alter the operation of the filed rate statute between common carriers and their customers.

The Fifth Circuit in *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), pointed out that this Court had recently followed this same reasoning in holding that the Motor Carrier Act of 1980 did not compel abandonment of a long established interpretation of the Interstate Commerce Act. The Fifth Circuit recognized that the Supreme Court in *Square D, supra*, reasoned that Congress must have been aware of the long-established doctrine when it passed the 1980 Act, and Congress, having refrained from specifically changing the statutory provision, should not be presumed to have intended to change it. 864 F.2d at 390-91, quoting, *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986).

Likewise, the ICC has specific congressional authority in 49 U.S.C. Section 10762 to depart from the statute's requirement as to how long a rate must be filed before it may become effective. 49 U.S.C. Section 10762(d). The ICC has used this authority to promulgate a rule that a reduced rate may become effective one day after filing. 49 C.F.R. Section 1312.4(e) (1988); *Southern Motor Carriers Rate Conference v. United States*, 773 F.2d 1561 (11th Cir. 1985). The reason for shortening the notice period appears obvious. The period was shortened so that carriers and shippers can negotiate lower rates for immediate shipping, yet, still abide by the filed rate statute.

Thus, when Congress has wanted to allow the ICC to depart from a requirement clearly established by statute, Congress has included specific authority in the statute to depart from its requirements. However, except for the transportation of household goods, Congress has never given the ICC authority to hold a motor common carrier's unfiled rate supreme over its filed rate.

This conclusion was reached by the Fifth Circuit Court of Appeals in considering the propriety of the ICC's policy statement in *Negotiated Rates I*. In *Supreme Beef*, *supra*,

the Fifth Circuit noted that Congress left Section 10761(a) untouched, even though it liberalized the requirements for contract cartage. 864 F.2d at 390-91. Relying heavily on *Square D Co. v. Niagara Frontier Tariff Bureau, supra*, the Fifth Circuit held that the Motor Carrier Act of 1980 affirmed, rather than repealed the filed rate doctrine.

C. The ICC's General Reasonable Practice Jurisdiction Cannot Be Used To Nullify The Specific Requirements Of Other Sections Of The Statute

Central to this genre of cases is the purported conflict between 49 U.S.C. Sections 10701(a) and 10761(a). What is not explained by the *Maislin* decision is that those two sections of the Interstate Commerce Act had peacefully co-existed for decades until the ICC issued its policy statements in *Negotiated Rates I & II*. It is only this most recent and extravagant expansion by the ICC of its definition of "reasonable practice" which puts the ICC in conflict with the congressional policy of anti-discrimination and strict enforcement of tariffs. As evidence of this capriciousness, Amici bring to this Court's attention the case of *Atlas Foundry & Machine Co. v. IML Freight, Inc.*, 1985 Fed. Carr. Cas. (CCH) para. 37,162 at 47,611 (ICC 1985) which was decided prior to the *Negotiated Rates* policy statements but subsequent to the enactment of the Motor Carrier Act of 1980. In *Atlas* the archetypal negotiated rates scenario was proffered to the ICC with the defense of an unreasonable practice pursuant to 49 U.S.C. Section 10701(a). The ICC found that:

[T]he Commission has no jurisdiction over the matters raised by complainant and that section 10701(a) was not intended to give the Commission jurisdiction for "unreasonable practices" of the nature alleged in the complaint. The dispute between these two parties is a private matter and must be resolved elsewhere.

Id. at 47,612. Commissioner Strenio, concurring in *Atlas*, further cautioned that if this behavior becomes pervasive "findings and recommendations" should be forwarded to "Congress for appropriate legislative relief." *Id.* at 47,612. The result and rationale used by the ICC in 1985 is completely opposite to what the ICC now states in *Negotiated Rates I & II*.

The purpose of the strict enforcement of tariffs is to prevent shippers from obtaining secret discounts from carriers. "This goal would be subverted if a shipper and carrier could by agreement change the terms of the applicable tariff rate." *Western Transp. Co. v. Wilson & Co., Inc.*, 682 F.2d 1227 (7th Cir. 1982), (citing S.Rep. No. 46, 49th Cong. 1st Sess., at 200 (1886)). The ICC's assertion that under some circumstances the published tariff may be changed by private agreement is at best inconsistent with the statutory purpose. Similarly, to make the carrier's obligation to collect the full tariff rate an unreasonable practice because of the existence of private agreements between the shipper and carrier is contrary to the ICC's statutory authority. 49 U.S.C. Section 10101(a)(4) and 49 U.S.C. Section 10761(a).

To allow the ICC to find that some shippers and common carriers can charge a rate other than that contained in a published tariff would at the least "remove the teeth" from 49 U.S.C. Section 10761(a), and at worst render it a nullity. Moreover, since a negotiated rate is never filed it is free from scrutiny under 49 U.S.C. Sections 10708(a)(1) and 11701(a).

Amici has appended a list of decisions rendered by the ICC under *Negotiated Rates I & II* (Appendix "A" hereto). In each and every case the ICC found the existence of a "negotiated rate" and relieved the shipper of its obligation to pay the full tariff charges sought. In fact, in only four cases was the shipper required to pay any undercharges. In all of the cases appended undercharges in the amount of \$3,145,263.70 were waived by

the ICC. In contrast shippers were obligated to pay a mere \$6,557.55. Thus, by dollar amount the ICC has allowed 99.79% of all unfilled charges to take precedence over the carrier's filed rates. Amici assert that the ICC with its boilerplate analysis of "negotiated rates" has completely emasculated the requirement of 49 U.S.C. Section 10761(a).

To illustrate the ease of proving and the perfunctory acceptance of the *Negotiated Rates* criteria the case of *MCI Telecommunications Corp. v. E.L. Murphy Trucking Company*, 1990 Fed. Carr. Cas. (CCH) para. 37,772 at 47,014 (ICC 1989) is brought to this Court's attention. In *MCI* the motor common carrier was denied, by the Commission, the opportunity for oral hearing to allow cross examination of the two witnesses who, through written statements, supported the negotiated rates finding. In fact, the Commission has never allowed an oral hearing in a negotiated rates case. This is the caprice or fiction that the Commission has created, under the *Negotiated Rates* policy, for a consistent pro-shipper finding.

The ICC's total disregard for the filed rate doctrine is best illustrated by Chairman Gradison's remarks at the Hearing on *Negotiated Rates II* when she stated; "I'm of the opinion that with the 75 to the 100 cases we've issued, though they have been referred to us by the courts, this agency has never seen a negotiated rate it didn't like." Hearing on *Negotiated Rates II*, remarks of Chairman Heather J. Gradison at 23 (May 2, 1989) (Appendix "B" hereto at 19a).

Although claiming that *Negotiated Rates I & II* are a limited response and not a universal rule, the ICC has created a fiction by stating that other provisions of the Motor Carrier Act will aid to eliminate any transgressions that the *Negotiated Rates* policy does not cure. As stated by the Solicitor General in the brief submitted in support of granting certiorari in this case:

Nor does the ICC's policy transgress other provisions that support the filed rate requirement. See Pet. 20. The Act creates civil liability for a shipper's knowing receipt of a rebate (49 U.S.C. 11902) and criminal liability for the knowing provision or receipt of transportation at below-tariff rates (49 U.S.C. 11903). A shipper that violates those provisions by *knowingly* paying an unfiled rate would be barred from taking advantage of the Commission's *Negotiated Rates* policy (because reliance on the applicability of the negotiated rate must be reasonable). A carrier that violates those provisions is hardly in a position to complain if it is later denied the windfall of a higher tariff rate that exists only because it ignored its duty to make a timely filing.

Brief of Federal Respondent at 8, n.4.

Despite these words of enforcement might the sad fact is that since the ICC's first expression of its *Negotiated Rates* policy in 1986 there has *not* been one shipper or carrier who has been charged civilly or criminally under either 49 U.S.C. Section 11902 or 49 U.S.C. Section 11903. The ICC's rhetoric is like a policeman who does not police complaining of the high crime rate.

What is most distressing to Amici is that the ICC seeks a remedy that is not statutorily authorized but that is alleged to be administratively needed. However, the ICC is endowed with the ability to impose civil and criminal fines, neither of which has been utilized, to stem the tide of negotiated rates and satisfy the perceived need. See 49 U.S.C. Sections 11901(b), 11914(b). Any additional remedial power should be sought from Congress—it is not up to the Commission to rewrite the law.

D. Simple Tenets Of Statutory Construction Strongly Support The Viability Of 49 U.S.C. Section 10761(a)

The ICC's decisions in *Negotiated Rates I & II* are inconsistent with rules of statutory construction and act to make 49 U.S.C. Section 10701(a) nullify 49 U.S.C. Section 10761(a). Normally, the rule that the specific

statute controls the general statute applies to statutes in different acts. 2A N. Singer, *Sutherland Statutory Construction*, Section 51.05 (4th ed. 1985). However, the rule makes sense in this situation because the filed rate statute is a specific key rule in the regulatory scheme. Congress has given the ICC authority to regulate carrier practices, but Congress itself has enacted a controlling law—that the filed rate controls.⁴

In *R.C.C.C.*, *supra*, 793 F.2d at 379, the United States Court of Appeals for the District of Columbia Circuit held that the ICC could not allow freight forwarders to operate under a filed tariff which was no tariff at all because shippers and carriers could not calculate rates based on a tariff. The Court of Appeals reasoned that this waiver of the filed rate requirement was beyond the ICC's authority because the filed rate requirement is central to the Interstate Commerce Act and the Act itself did not give the ICC specific authority to waive the requirement. The ICC under its general regulatory power cannot change a key rule established by statute. *Texas & Pacific Ry. v. ICC*, 162 U.S. 197 (1896).

Without question the filed rate requirement is a key part of the regulatory scheme. It is set by a specific statute, and the statute itself does not expressly give the ICC authority to vary the filed rate requirement. Thus, the ICC's general power to determine the reasonableness of carrier practices cannot give it authority to declare collection of the filed rate an unreasonable practice.

Throughout the entire history of the Interstate Commerce Act the obligation to file tariffs was supported by the harsh consequences for failure to do so. Given the apparent ease of proving a "negotiated rate", no shipper or carrier need fear an undercharge or overcharge claim.

⁴ This rationale is equally true where the ICC alleges that the window of opportunity for allowing 49 U.S.C. Section 10701(a) to vitiate 49 U.S.C. Section 10761(a) is derived from the transportation policy found at 49 U.S.C. Section 10101.

No matter how desirable the ICC or the courts find this outcome, it is solely Congress' prerogative to alter the statutory scheme of the Interstate Commerce Act.

E. *Seaboard* Has Been Misapplied By The ICC And The Eighth Circuit And Does Not Permit Waiver Of The Undercharges

The Eighth Circuit in *Maislin* and the ICC in its *Negotiated Rates* decisions have used *Seaboard System R. Inc. v. United States*, 794 F.2d 635 (11th Cir. 1986) as the cornerstone for departure from past strict application of 49 U.S.C. Section 10761(a). In *Seaboard*, which involved a direct complaint filed with the ICC, the Commission ordered the waiver of a railroad's undercharges due to the confusing nature of the tariff involved. *Seaboard* is readily distinguishable and plainly in opposition to the facts presented here for several reasons.⁵

First, *Seaboard* was a rail case and the ICC's jurisdiction differs as it relates to rail and motor carriers. Compare, 49 U.S.C. Section 10704(a)(1) and 10704(b)(1). The ICC has jurisdiction to waive rail undercharges, but not motor carrier undercharges. See *Negotiated Rates I*, *supra*, 3 I.C.C. 2d at 102. *Negotiated Rates II*, *supra*, 5 I.C.C. 2d at 625. This is a significant difference with the situation in *Seaboard*, where a rail carrier was involved. A shipper's remedy for motor carrier undercharges is to pay the rate and file a civil action for reparations pursuant to 49 U.S.C. Sections 11705(b)(3) and 11706(c)(2). *Supreme Beef*, *supra*, 864 F.2d at 391.

Second, *Seaboard* arose from a complaint proceeding before the ICC and not from a court referral. Consequently, the Eleventh Circuit was not being asked to accept or reject an advisory opinion. As the *Seaboard*

⁵ *Seaboard* did not involve a negotiated, unpublished rate versus a tariff rate. Rather, "[t]he controversy reflects a somewhat unclear published tariff." 794 F.2d at 636 (emphasis supplied).

court stated, it could *not* recognize an equitable defense. 794 F.2d at 638.

Finally, *Seaboard* held that the tariff terms were not plain to the ordinary user. 794 F.2d at 638. Therefore, the Eleventh Circuit concluded that the ICC's decision did not abrogate the requirement of 49 U.S.C. Section 10761.

Here, the Eighth Circuit upheld the district court's judgment, after referral to the ICC, that the collection of the filed rate would be an unreasonable practice. Relying on *Negotiated Rates I*, *Seaboard* and *Western Transp. Co. v. Wilson & Co.*, *supra*, the Eighth Circuit upheld the ICC's jurisdiction to not only find that a practice contained in a filed tariff may be unreasonable (*Seaboard* and *Western* holdings), but, going one step further, that the collection of the filed rate can be an unreasonable practice when shipper and carrier have negotiated an unfiled rate. This is clearly a strained judicial reading given the factual predicates in *Seaboard* and *Western*. The practices found to be unreasonable in *Seaboard* and *Western* were contained in filed tariffs, whereas in *Maislin* the collection of the filed tariff rate was deemed an unreasonable practice. Moreover, in *Seaboard* and *Western* the rate ultimately enforced was a filed rate, but in contrast in *Maislin* no filed rate was enforced. Thus, the cases relied upon in *Maislin* are inapposite to the decision.

The Eighth Circuit would have one believe that any time the specter of unreasonableness is raised a court must refer the issue to the ICC. To buttress this assertion, the Eighth Circuit cites, *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956), as the basis for Supreme Court authority that a determination of reasonableness of a rate or practice must be made by the ICC under the doctrine of primary jurisdiction.

The Eighth Circuit fails to state that the Court in *Western Pacific* was dealing with rates and practices

found in a filed tariff, not an unfiled negotiated rate or practice. In *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976) (emphasis supplied), this Court stated that the doctrine of primary jurisdiction applies:

[W]hen an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency, e.g., *Danna v. Air France*, 463 F.2d 407 (2d Cir. 1972); *South Western Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411 (1959).

Similarly, in *Western Pacific* the reasonableness of a tariff and tariff construction as applied was the specific issue being referred, not a negotiated unfiled rate or practice. The Court in *Western Pacific* was concerned with a practice found in a filed tariff.

Additionally, this Court in *Nader* observed:

For example, if respondent's overbooking practices were detailed in its tariff and therefore available to the public, a court presented with a claim of misrepresentation based on failure to disclose need not make prior reference to the Board, as it should if presented with a suit challenging the reasonableness of practices detailed in a tariff. Rather, the court could, applying settled principles of tort law, determine that the tariff provided sufficient notice to the party, who brought the suit—as, indeed, petitioner suggests it would.

Nader, 426 U.S. at 306, n.14 (emphasis supplied).

The ICC relies upon *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) to allow it to determine that a carrier's action to collect the filed rate may be incompatible with the reasonable practice provision of the Interstate Commerce Act. However, the ICC's reading of *Hewitt-Robins* could not be more strained than in this instance. *Hewitt-Robins* involved misrouting practices and, therefore, the concerns underlying the filed rate doctrine were not present. Indeed, this Court in *Hewitt-Robins* specifically noted its holding was directed at questions of misrouting when it stated

"here the challenge is not at the reasonableness of the rates, but at the carrier's misrouting practice. The question, therefore, is not one of rates but of routes." *Hewitt-Robins*, 371 U.S. at 87. The rate ultimately applied was a filed rate, the routing distinction only determined whether it would be an interstate filed rate or an intrastate filed rate.

Moreover, *Maislin* in effect eliminates the need for a carrier to file rates by elevating oral agreements to the level of filed tariffs. By allowing 49 U.S.C. Section 10701(a) to take precedence over 49 U.S.C. Section 10761(a) the Eighth Circuit has overturned legislation and legal precedent that has controlled this issue for the last eighty years. This type of judicial activism is inappropriate given the fact that Congress has spoken recently in the Motor Carrier Act of 1980 and did not alter 49 U.S.C. Section 10761(a).

CONCLUSION

Section 10761(a) is, from a statutory and *stare decisis* standpoint, a crucial element of our national transportation policy. It enables shippers and carriers to move freight at specific rates in a fashion that not only gives notice to all but forms the foundation of our transportation policy, anti-discrimination. The viability of this statutory provision should be affirmed, and the determination of the Eighth Circuit should be reversed.

Respectfully submitted,

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March 2, 1990

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APPENDICES

APPENDIX A

<u>Title</u>	<u>Waived *</u>	<u>Allowed</u>
MCC 10961 Primary Steel, Inc. v. Maislin Industries, U.S., Inc.	\$187,923.26	
MCC 10962 TMBR Drilling, Inc. v. Younger Transportation, Inc.	\$ 31,500.00	
MCC 10991 Wakefern Food Corporation v. Southwest Freight Lines, Inc.	\$ 27,003.26	
MCC 30005 Soveriegn Oil Company v. Dependable Cartage and Transp.	\$500,000.00	
MCC 30015 Freeman Products, Inc. v. Rebel Motor Freight, Inc.	\$148,830.44	
MCC 30019 Motor Carrier Audit & Coll. Co. v. Baldor Electric Comp.	\$ 16,664.01	1,772.01
MCC 30030 Packerland Packing Company, Inc. v. Maislin Industries U.S., Inc.	\$ 4,399.79	400.12
MCC 30032 Breman's Express Company v. Mitchell Milling Co., Inc.	\$ 15,731.00	
MCC 30034 Don Fisher Sales Company v. Genco Trans. Services, Inc.	\$235,677.28	
MCC 30055 Delta Traffic Services, Inc., RTC Transp., Inc. v. Commercial	\$ 15,920.39	
MCC 30061 Hiram Walker & Sona, Inc. v. (Tobler)	\$ 78,874.69	
MCC 30062 American Industries, Inc.	\$ 5,328.90	
MCC 30076 Ottawa, Strong & Strong, Inc. v. Tobler Transfer, Inc.	\$383,140.00	
MCC 30077 Fleming Potter Company, Inc. Morton Metalcraft Co., Baldor	\$108,000.00	

* The amounts *Waived* may well be understated as many of the ICC proceedings combine a number of individual cases and do not always state the entire amount of undercharges waived. However, Amici believe the amount *Allowed* is accurate because the ICC specifically indicated what freight bills were allowed.

2a

<u>Title</u>	<u>Waived</u>	<u>Allowed</u>
MCC 30079 Johanson Transportation Service	\$ 5,006.07	
MCC 30080 Branch Motor Express Company v. Ampad Corporation	\$ 58,321.20	
MCC 30081 Orval Kent Food Company, Inc.	\$ 8,058.41	
MCC 30083 Rubbermaid Incorporated v. Delta Traffic Service, Inc.	\$ 22,558.61	
MCC 30084 Delaware Valley Shippers Asso.	\$ 14,105.79	
MCC 30088 Royal Oak Enterprises v. Professional Truck Auditing	\$ 8,961.77	
MCC 30093 General Mills, Inc. v. Tobler Transfer Company	\$121,844.29	
MCC 30096 Delta Traffic Service, Inc. v. Star Bronze Co.	\$ 4,992.47	
MCC 30099 AP Industries, Inc.	\$ 23,707.81	
MCC 30100 Ottawa Strong & Strong, Inc. v. Tobler Transfer, Inc.	\$229,629.44	
MCC 30106 Motor Carrier Audit & Coll. Co. v. Fisher Mills (West)	\$ 68,308.41	
MCC 30107 Carlyle Johnson v. Savage Brothers, Inc.	\$ 62,415.50	
MCC 30108 Oneida Motor Freight, Inc. v. Fort Howard Cup Corp.	\$ 26,951.00	
MCC 30109 Delta Traffic Service, Inc. v. KR Newsprint Co., et al.	\$ 37,350.00	
MCC 30110 Stanek Distributing Co., Inc. v. Oran Paul Yates & Cora Yate	\$ 14,566.00	
MCC 30112 Georgia Freight Bureau, Inc. v. Delta Traffic Service, Inc.	\$ 1,430.46	
MCC 30115 MCI Telecommunications Corp. v. E.L. Murphy Trucking Co., et al.	\$ 37,875.66	
MCC 30116 Navistar International Corp. v.	\$ 21,878.59	
MCC 30122 Dixie Riverside, Inc. et al. v. Delta Traffic Service, Inc.	\$137,644.03	

3a

<u>Title</u>	<u>Waived</u>	<u>Allowed</u>
MCC 30124 Titan Transport, Inc. v. The Pillsbury Company	\$ 23,280.00	
MCC 30127 Farrell Calhoun Paint Co., Inc. v. Rebel Motor Freight, Inc.	\$ 8,977.85	
MCC 30130 Sunwise Corporation v. RTC Transportation, Inc.	\$ 26,633.88	\$3,237.46
MCC 30134 Thomas J. Lipton, Inc. v. Campbell 66 Express, Inc.	\$ 2,673.00	
MCC 30136 Midwest Drywall Company Inc.	\$ 11,176.73	
MCC 30137 B&B Beverage Co. v. Eazor Special Services, Inc.	\$ 5,471.18	
MCC 30139 Ideal Chemical and Supply Co. v. Rebel Motor Freight	\$ 2,076.18	
MCC 30140 Sunshine Mills, Inc. v. Rebel Motor Freight, Inc., et al.	\$ 6,007.60	
MCC 30144 Mid Florida Mining Company	\$ 12,860.02	
MCC 30148 Falcon Transport, Inc. v. Delta Traffic Service, Inc.	\$ 16,534.23	
MCC 30150 Delta Traffic Service, Inc., RTC Transp., Inc.—(Hormel)	\$ 10,805.23	\$1,147.96
MCC 30152 Willbanks Steel Corp. v. The Equaw Transit Company et al.	\$ 12,409.86	
MCC 30156 Ormand Shops, Inc. v. Oneida Motor Freight, Inc.	\$ 54,369.41	
MCC 30159 Milwaukee Electric Tool Corp.	\$ 96,031.13	
MCC 30085 Alex Foods v. RTC	\$ 90,000.00	
MCC 30087 Goodmark Foods v. Delta Traffic	\$ 9,106.73	
MCC 30078 Meyer Products Div., Louis Berkman Co. v. Spector	\$ 70,249.14	
MCC 30075 Ford Howard Paper Co. v. West Coast Truck Liwes	\$ 22,003.00	
<u>Total</u>	<u>Waived</u> \$3,145,263.70	<u>Allowed</u> \$6,557.56

APPENDIX B

BEFORE THE UNITED STATES
INTERSTATE COMMERCE COMMISSION

Ex Parte No. MC-177

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE—
PETITION TO INSTITUTE RULEMAKING OF NEGOTIATED
MOTOR COMMON CARRIER RATES

No. MC-C-30090

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE—
PETITION FOR DECLARATORY ORDER ON NEGOTIATED
MOTOR COMMON CARRIER RATESHearing Room A
12th & Constitution Ave., N.W.
Washington, D.C.

Tuesday, May 2, 1989

The VOTING CONFERENCE in the above-entitled
matter was convened, pursuant to notice, at 10:02 a.m.

[2]

BEFORE:

HEATHER J. GRADISON, Chairman
JOSEPH J. SIMMONS, III, Vice Chairman
PAUL H. LAMBOLEY, Commissioner
FREDERIC N. ANDRE, Commissioner
KAREN BORLAUG PHILLIPS, Commissioner
NOBETA R. MCGEE, Secretary

APPEARING BEFORE THE COMMISSION:

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[3]

PROCEEDINGS

[10:02 a.m.]

CHAIRMAN GRADISON: Good morning, ladies and gentlemen. This is the time and the place set by the Interstate Commerce Commission to hold an open special conference on MCC-30090, National Industrial Transportation League Petition for Declaratory Order on Negotiated Motor Common Carrier Rates and Ex Parte MC-177, National Industrial Transportation League Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates.

The purpose of this conference is for the members of the Commission to discuss among themselves the Commission's options concerning the NIT League's request that the ICC issue a declaratory order finding that it is an unreasonable practice and thus a violation of the Interstate Commerce Act for a motor common carrier to conduct business on the basis of a negotiated and

agreed to rate while failing to publish that rate in an effective tariff on file at the Commission.

In this context, the Commission will discuss its negotiated rates policy generally and will specifically consider whether to modify and or clarify that policy, as it's now described in Ex Parte MC-177, by adopting the NIT League's proposal or taking some other action. The Commission will then vote on these agenda items.

Today we again must address the appalling situation [4] where carriers agree to charge certain rates but fail to publish these negotiated rates and tariffs and thereafter attempt to force shippers to pay the higher rates set forth in their published tariffs. The practice is doubly reprehensible since it can occur only because of the legal requirement that the rate collected by a common carrier must be filed in a tariff.

While the Commission's negotiated rates policy statement and its handling of cases pursuant to that policy have helped some shippers to defend themselves against these practices, we are here today to explore ways in which the Commission may more effectively be of assistance in these matters.

I'd like to thank Commissioner Phillips who has at my request coordinated activities in preparation for today's open conference. I'd like to call on Director Jane Mackall for opening remarks. Director Mackall.

MS. MACKALL: Good morning, Madam Chairman. With me this morning at the table are on my left general counsel Bob Burk and on my right, deputy director of the motor section, Richard Felder.

In 1986, the Commission issued its policy statement on Ex Parte No. 177 to deal with the developing problem involving undercharge suits filed in the courts.

These suits typically filed by trustees for bankrupt [5] carriers or their agents sought to collect tariff rates from shippers who had previously negotiated and paid lower rates that were never published in a tariff. The

policy statement limits Commission action to cases referred by a court.

Under the policy statement, the Commission decides whether under all the relevant circumstances, collection of the undercharges would be an unreasonable practice. Armed with the Commission's unreasonable practice finding, the shipper can seek to avoid payment of added charges based on the otherwise applicable tariff rate. To date, the Commission has received close to 100 cases.

The rulings have been in favor of the shippers in cases decided on the merits. In each of those cases, the Commission determined whether there was a negotiated but unpublished rate, whether negotiations were held with and the rate was quoted by, a responsible carrier official and whether the shipper reasonably relied on the rate quotation.

With all of these elements proven, the Commission determined that collection of any unreasonable charges based on the tariff—additional charges based on the tariff rate would be an unreasonable practice. As General Counsel Burk will explain after my statement, neither the 177 policy statement nor your implementation of it has removed the burden from the shipping community.

Shippers are still being presented with balance due [6] bills and questions have been raised about the policy statement's requirement for a court referral before a negotiated rate complaint can be instituted. In addition, calling the negotiated rates decision advisory in the 177 statement has caused confusion. Because that statement had offered in insufficient relief, the NIT League filed another petition for a declaratory order this time seeking a somewhat different finding.

The Commission published notice of the petition under Docket MC-C-30090, gathered comments, but then held the matter in abeyance at the petitioner's request pending a coordinated shipper-carrier effort to secure legislative

relief. When a legislative solution failed to materialize, NIT League sought expedited action.

The purpose of this conference is to discuss what further action the Commission should take to implement its continuing policy that when a negotiated rate is billed and paid; the shippers should not be liable for anything more.

You have before you an options paper addressing the key issues. This concludes my opening remarks and we'll be happy to answer any questions you have but before that, Bob has an opening statement.

MR. BURK: Madam Chairman, Mr. Vice Chairman, Commissioners. I would like to present a brief statement this morning from our perspective in the litigation we are faced [7] with in the courts.

In the wake of the Commission's decision in Ex Parte No. MC-177, two lines of court cases have developed. In the first, courts are doing what the Commission had hoped when faced with an undercharges suit involving unfilled negotiated rates. In the second line, they are not.

Representative of the first line is the case of James B. Orr ad Highway Express v. I.C.C. in the western district of Tennessee. In that case, Orr filed suit for undercharges based on the difference between the negotiated rate and the filed rate. The court ordered referral to the Commission on the motion by the shipper for consideration of whether collection of undercharges would be an unreasonable practice.

Commission found it would and that decision was returned to the court for review. The Orr court found, "It is undisputed that the question of whether certain acts constitute unreasonable practices is within the I.C.C.'s primary jurisdiction."

Upon review of case law, the MC-177 rationale, the court further found no abrogation or even undercutting of the filed rate doctrine. The court applied the ABA arbitrary and capricious standard to the Commission's decision, upheld it and denied the suit for undercharges

as moot in view of the finding of an unreasonable practice by the Commission.

The Orr decision is presently on appeal to the 6th [8] Circuit and our brief is due on May 31st.

The decision on Motor Carrier Audit and Collection Co. v. United Food Service exemplifies the other line of cases. There is similar circumstances as Orr, the shipper moved pursuant to Ex Parte MC-177 to refer the issue of unreasonable practice to the Commission. The court refused to do so. The court interpreted MC-177 as follows, "The I.C.C. has offered to provide the court non-binding advisory opinions as to whether under the circumstances presented it would be unreasonable to collect an undercharge."

On that interpretation, the court went on to state, "While the I.C.C. may still advise a court, it is difficult to understand how in the light of a clear precedent establishing that equitable expenses are not generally available, a court should adopt the I.C.C.'s recommendation that a defendant be allowed to assert those defenses."

So what we have are two diametrically opposed readings by the courts as to the nature and effect of the Commission's negotiated rate policy statement. Simply put, the issue before you today is whether to issue a clarification of that policy statement to make clear that the Orr court's view is correct and to remove any basis in the present Commission language for court's to reach the conclusion in the Motor Carrier Audit court.

I am sure you are aware of the importance of acting [9] now. Already 45 cases in district courts have resulted in refusals to refer to the Commission. Over 75 cases have been referred to the Commission and your decisions on those referrals will be reviewed by the courts.

Appeals to circuit courts now exist in the 2nd, 6th, 7th, 8th and 9th circuits.

If you agree as I believe was your intent with the Orr case reasoning, you go now to clarify your policy on

negotiated rates will be enormously helpful to the successful outcome of this litigation. Thank you, and I'm available for any questions you may have.

CHAIRMAN GRADISON: Thank you. Commissioner Phillips, I wonder if you'd take over at this point.

COMMISSIONER PHILLIPS: Thank you very much, Madam Chairman. As was mentioned, Chairman Gradison asked me to coordinate the Commission's efforts to establish a framework for discussing potential Commission action with respect to negotiated rates. In effort to develop a consensus on what further steps the Commission should take in this area, I have conferred individually with each of my colleagues.

I am pleased to report that we have identified several options, we have considered the Commission's experience to date under the existing interpretation of our MC-177 policy, the treatment of these cases by the courts, and the comments of the parties in [10] MCC-30090. My colleagues and I agree that further Commission action is needed.

We have identified six options. Before we discuss and vote on them, I would like to describe briefly each of these options. I believe that a consensus exists for the first four options. On the fifth option, dealing with the Commission's disposition of the NIT League's declaratory order petition, there now appears to be a difference of opinions among my colleagues.

Likewise, a consensus has not yet been reached on a sixth option, which concerns procedures by which the Commission would implement any decision taken here today. Despite the fact that we have not reached a consensus, the level of interest expressed by my colleagues on the sixth option made it desirable to include it for discussion.

The first option we have identified is to reopen on our own motion Ex Parte No. MC-177 for further clarification and enunciation of our policy regarding negotiated rates cases. As Director Mackall and General Counsel

Burk have pointed out, since our 1986 decision in Ex Parte MC-177 and subsequent clarifying decisions, the Commission has gained experience with negotiated rates cases. The Commission, as well as the courts, have decided a number of these cases.

This process has served to identify several areas in which the policy enunciated in MC-177 may require clarification [11] and strengthening. One of these areas, which General Counsel Burk has clearly described, is the split among the courts over the propriety of referring negotiated rates cases to the Commission. The split seems to stem, at least in part, from some misinterpretation of the Commission's statement in MC-177.

In that case, the Commission stated that it would provide advisory opinions on negotiated rates cases referred to us by the courts. Reopening MC-177 would permit the Commission to address this misinterpretation and to strengthen the policy outlined in MC-177. It would also allow us to establish primary jurisdiction over negotiated rates cases. Reopening MC-177 would also permit us to clarify other areas of our MC-177 policy, including whether the Commission will accept negotiated rates cases for decision without prior referral by the courts, and whether those cases should continue to be handled on a case by case basis.

If the Commission votes to approve the reopening of MC-177, our second option is to clarify that the Commission's opinions in negotiated rates cases will represent the exercise of its primary jurisdiction and thus are binding and only subject to judicial review under the "arbitrary and capricious standard."

This option is intended to address the split among the courts identified by the General Counsel and to strengthen the legal posture of shippers who seek to rely on the [12] Commission's MC-177 policy in obtaining relief in negotiated rates cases.

The third option we have identified is for the Commission to amend the policy outlined in MC-177, to permit Commission consideration of negotiated rates cases with-

out court referral. The purpose of this proposal is to provide an additional procedure by which shippers faced with potential undercharge claims could seek relief.

Under this procedure, a shipper who is notified of possible liability for undercharges claimed by a motor carrier could seek a declaratory order from the Commission determining whether collection of the alleged undercharges would be an unreasonable practice, even if the carrier had not instituted court proceedings.

The goal of this option is to encourage resolution of negotiated rates cases before cases are filed in the courts, to encourage private resolution during the pendency of cases that are filed, and to simplify those negotiated rates cases that do proceed to adjudication in the courts. This proposal is consistent with the Commission's authority under the Administrative Procedure Act; that is, to issue declaratory orders in order to terminate controversies or to remove uncertainties.

The fourth option is whether the Commission should continue to handle negotiated rates cases on a case by case [13] basis. In MC-C-30090, the NIT League and others have urged the Commission to adopt a declaratory order declaring in general terms the circumstances when the collection of alleged undercharges would constitute an unreasonable practice.

The NIT League's proposed solution offers a seemingly straightforward approach to negotiated rates cases. If adopted, however, it would leave the factual determination as to whether any particular set of facts amounts to an unreasonable practice to the courts.

In effect, the Commission would be called upon to exercise its expertise in determining what constitutes an unreasonable practice in only a generalized way. Therefore, it is not clear whether this approach would resolve the split among the courts as to the appropriate resolution of negotiated rates cases. Nor is it clear that this approach would be sufficiently persuasive to a court to increase the probability that a shipper making the types

of showings required by such a declaratory order would prevail.

For this reason, I believe there is sentiment among most Commissioners to continue to handle negotiated rates cases on a case by case basis. If the Commission votes to reopen and clarify Ex Parte No. MC-117, and to continue to handle negotiated rates cases on a case by case basis, a fifth option for the Commission's consideration is whether the petition in MCC-30090 should be held in abeyance for further consideration [14] based upon shipper, carrier and Commission experience following implementation of the initiative adopted by the Commission here today.

As I mentioned, the proposal for a declaratory order in MCC-30090 is a valid response to recent developments in negotiated rates cases. Accordingly, I do not believe that there is a consensus among my colleagues to deny the petition. As of last Friday afternoon when I circulated the voting sheet now before the Commission, there appeared to be a consensus in favor of holding the NIT League petition in abeyance at this time.

I have since been made aware that this is in fact no longer the case. However, it appears that there is a majority that believes that continued use of the case by case procedure may be more effective in obtaining favorable judgments in negotiated rates cases. By holding the petition in MCC-30090 in abeyance, the Commission will be able to assess the progress made under the policies we adopt here today and to reconsider adoption of the MCC-30090 petition if it appears desirable in the future.

The sixth option, also on which consensus has not been reached, concerns the mechanics of the Commission's implementation of the decisions we take today. Under current procedures, the negotiated rates case docket has been handled expeditiously by the Commission's Office of Proceedings. [15] However, if the Commission adopts the five options I just outlined, the potential exists for a greatly expanded case load.

Under this option, the Offices of General Counsel, Proceedings and Hearings would be directed to develop a docket management plan for the Commission's handling of future negotiated rates cases. This option is not intended to establish a burdensome new procedure for the handling of negotiated rates cases, or lead to the creation of new evidentiary requirements.

Rather, it is intended to ensure continued expeditious handling of these cases, regardless of the volume of cases received and to encourage the best use of Commission resources, including administrative law judges in meeting this goal. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you, Commissioner Phillips. Are there opening statements by any individual members of the Commission? Commissioner Lamboley?

COMMISSIONER LAMBOLEY: I guess I would be next. I want to—thank you, Madam Chairman. I want to commend Commissioner Phillips for the energy and consideration she's given to the problems that have been visited on the industries following our adoption of MC-177. I think that Commissioner Phillips has demonstrated considerable imagination and thoughtfulness in approaching the variety of problems and the [16] various options that one could consider as appropriate.

In this case, I think that for my own part, I'd feel very comfortable in voting yes for all of the options and I'll briefly say why. I think it's obviously important for us to reopen and clarify MC-177 to do three things at the outset. First, make clear that our claim to jurisdiction is one of primary, if not exclusive, jurisdiction for the purpose of interpretation of the Interstate Commerce Act provisions as it relates to unreasonable practice.

Secondly, to remove from the procedural requirement, the court referral, which I believe has been a barrier in some measure, to having cases filed here initially. Thirdly, I believe that if we proceed in appropriate fashion, the courts will accord to us as having done our

primary jurisdictional responsibilities in such a way that the judicial review under ordinary standard would be accorded to our decisions.

I think further that we should continue to handle the cases on a case by case basis, and I feel comfortable that we should perhaps hold in abeyance the MCC-30090 for the purpose of being able, as Commissioner Phillips pointed out, to get a better sense of what now is happening as those cases would be developing before us, and not as cases developed in judicial forums, because they develop in different ways and sometimes non-transportation elements become more critical than the transportation elements, which are our responsibility.

[17] I think it would be advisable, and I would suggest, and attempt to urge my colleagues that we consider holding the NIT League petition in abeyance for the reason that we could bring the information more current in a period of six to nine months, would be a benchmark of time that I would have in mind in which to perhaps make an assessment then of what we've got in terms of the cases that have been filed, and the dispositions of the cases and the issues that have been joined by initial pleadings in proceedings before the Commission.

I think after that period of time, if it's possible, it might very well be that we adopt a policy statement along with a procedural companion provision which would suggest that if you meet the criteria of the policy statement, that an initial pleading demonstrating that might entitle the applicant who files the complaint or the petition to immediate relief, without much further, unless it is contested, on any serious and factual dispute in any way.

Now that's simply my general view as to the NIT League petition, which I think raises a number of critical issues. Based upon the experience that has been going on in judicial forums, I think however it's incumbent upon us in addition to the experience of judicial forums, to develop our own experience before we make an ulti-

mate decision about what a declaratory statement might be. But I do think that down the road, we might very well be able to visit and visit it far more [18] responsibly.

Finally, I think that what is offered in the suggestion of item number 6 is simply working through a procedural mechanism by which if there is a concern that we may be flooded with a large number of cases on the initial filing, that we have a procedure in place in which we can manage the docket and move them promptly and expeditiously.

We have recognized in the past that many of these have been fact-bound cases, and in those instances where it does appear to be fact-bound, it seems to me that there is an easy and efficient way of developing the record. Bundling some cases, which no doubt may come in from what the court records reflect. Frequently, there is a single carrier but a multiplicity of similarly situated claims that are involving a number of shippers, but only one carrier. I think it's quite possible to work out a scheme of docket management and control to handle all of those in a meaningful way.

Plus, giving the people who are able to develop the pattern early on, the opportunity to indicate that the carrier's circumstances may be more repetitive than perhaps fact-bound in subsequent cases. For that reason, I think it's incumbent, and wholly appropriate, that we develop the appropriate mechanism and I think the office of Proceedings and the Office of Hearings and the General Counsel's office are very capable of developing that. [19] I would make one final observation, and that is the Office of Hearings has in cases in which we've had, some difficult times in developing the record. It's performed quite admirably and I think it's terribly important that it not become a forum, if you will, to extend time limits, to otherwise be dilatory or otherwise create a paper record of size and volume beyond the circumstances.

I would point out that in such cases as the Santa Fe Southern Pacific divestiture of the SP, the ALJ's office was terribly important in developing the record on that as well as with the investigation into the Trailer Train question and a number of other cases. I've been quite pleased with respect to the docket management and control that the Chairman has requested under the rate cases.

The Office of Hearings has been more than able to bring those cases to fruition, at least to the point where the parties' negotiations are tracking along with the procedural schedule, in which disposition is ultimately going to be made. In short order, what that does is keep people's feet to the fire and it keeps them focused on the issues and doesn't let the cases wander. I think that's a terribly important ingredient of it. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you, Commissioner Lamboley. Commissioner Andre, do you have any remarks you'd like to open with?

[20] COMMISSIONER ANDRE: Yes, Madam Chairman. In October of 1986, the Commission in Ex Parte No. MC-177 issued a policy statement which established that shippers could assert equitable defenses in undercharge cases, and that if the shipper could also show that the carrier engaged in an unreasonable practice, the ICC would determine that the undercharge claim did not have to be paid.

At that time, it was my hope that the issuance of that policy statement would alleviate the problems that shippers were facing. However, it is becoming increasingly clear that the problem has not been resolved. Over 75 cases, perhaps approaching 100, involving approximately \$10 million have thus far been referred to the ICC and the Commission has favored the shipper in almost every one of these cases.

Unfortunately, many courts have refused to follow our ruling and there are thousands of other cases which have

either been voluntarily settled, tried and lost, or are currently pending. It is estimated that the shipping community is facing up to \$30 million in alleged undercharge bills.

It is my view, a view which I believe the majority supports, that there are two aspects of the Ex Parte No. MC-177 policy which have created this confusion. The first is the requirement of court referral and the second is the language of our decisions which implies that our decisions are merely advisory.

[21] Accordingly, I propose that Ex Parte No. MC-177 should be clarified to incorporate the following three points. Number one, that the Commission will exercise primary jurisdiction under the unreasonable practices provisions of the Interstate Commerce Act. Number two, that the Commission will eliminate the requirement of court referral and number three, that the decisions will no longer be characterized as advisory.

While there are certainly other ancillary issues which need to be resolved, our purpose today should not be to place blame, point fingers or take credit, but rather our purpose should be to sit down, discuss these aspects, reach a consensus, resolve the problem to the best of our ability, and produce a new policy statement reflecting that consensus. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you. Mr. Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Thank you, Madam Chairman. I'd like to join my colleagues in praising Commissioner Phillips and this spirit of collegiality and due diligence that she has brought these issues together before us today.

I've written several memorandums as it relates to MC-177 cases, and in the interest of time I won't expand beyond that in my memorandums that I've submitted to my colleagues and are available to the Commission watchers. In that regard, I am prepared to vote yes on all six issues.

[22] CHAIRMAN GRADISON: Thank you, Vice Chairman Simmons. I've strongly supported the Commission's past effort to rectify the problem of negotiated rates. We'd hoped that earlier steps that we took would resolve this problem. While they were a step in the right direction, we know that the problem persists and that the Commission must move forward with further measures if shippers are ever going to be extricated from this dilemma.

I fully support the proposition that the Commission must clarify its position with regard to its primary jurisdiction over these negotiated rates issues. Because the problem is so great, I'd go a step further than speaking only through 177.

I would also issue a rule which unequivocally sets forth the Commission's standards for determining when a shipper is entitled to a waiver of undercharges due to an unpublished but negotiated motor carrier rate. I'm supportive of any and all administrative measures which we can take to deal with these negotiated rates problems and am open to any suggestions for further action by this Commission. Finally, I continue to believe that the cleanest, most effective way to eliminate the problem is through legislation.

To open the discussion further, with regard to Commissioner Lamboley's statement that we need to build a record of our own experience before we issue a policy [23] statement, I'm of the opinion that with the 75 to the 100 cases we've issued, though they have been referred to us by the courts, this agency has never seen a negotiated rate it didn't like. We might just as well say that in a policy statement, both in of the 177 and the MCC-30090 proceedings, and move forward in that regard.

With regard to the addition of ALJs into the process, we have a one-step process today. We have a fine ALJ and Office of Hearings, and I agree that if the docket

becomes so voluminous that we are overwhelmed, that use of an ALJ might be the solution.

But for the time being, let's not take a one-step process and turn it into a two-step process. It seems to me we're all in agreement on that. I think that the language in the voting sheet it's pretty clear that we will work together with the GC's office. Proceedings and Hearings, to develop a flexible docket management plan. It seems to me that's the sort of unanimous endeavor that we undertake every day in working on managing our docket. I fail to understand why it requires a vote.

Having said that, are there any comments?

VICE CHAIRMAN SIMMONS: Yes, I would like to comment, Madam Chairman. As a member of the Commission, I certainly am not a clone for any 177 case that I didn't like. I like to think that each one of my votes is objective, with careful [24] thought, and not predetermined by any such action. That's the way I will approach these cases, as they're submitted to us on a case by case basis.

CHAIRMAN GRADISON: Commissioner Andre?

COMMISSIONER ANDRE: Yes. I have a question for Ms. Mackall, with regard to handling these cases in the Office of Proceedings. Isn't there a more streamlined way that you could be handling these cases, and thereby forego the necessity of bringing in ALJs?

MS. MACKALL: There certainly are different things we can do. We haven't needed to look to them yet, because the docket is so small that we can handle it very easily with our current staff. If it were to balloon, we would start looking at other things to do. For example, shortening the decisions, batching them for a vote as the Commissioners have already mentioned, things like that.

COMMISSIONER ANDRE: So that would thus streamline the process?

MS. MACKALL: Yes.

COMMISSIONER ANDRE: Furthermore, isn't it true that if we were to bring ALJs into the picture, that they have an automatic delay built into their appellate process?

MS. MACKALL: Well, as the Chairman said, it is two steps. They issue an initial decision and then there's the right of appeal. The right of appeal involves the appeal, the [25] reply and then the Commission's decision on the appeal.

COMMISSIONER ANDRE: So it appears to me, Madam Chairman, that bringing the ALJs into the picture has a downside risk to it as well as the possible positive aspects of it, inasmuch as there's a real potential there for increasing regulatory lag, which I don't think you want to do and I don't think this Commission wants to do.

CHAIRMAN GRADISON: Commissioner Lamboley, did you have a comment?

COMMISSIONER LAMBOLEY: No.

CHAIRMAN GRADISON: Okay. Well, why don't we go ahead and vote? Any further comments before we call the roll? I'm going to suggest, in view of the statements that have been made here today, that we vote on items 1 through 4 at the same time. Those in attendance here have the voting sheet before them.

This covers the issue of whether the Commission should reopen Ex Parte MC-177. If the answer to that is yes, should the Commission clarify Ex Parte 177 to explain that the Commission's options represent the exercise of its primary jurisdiction and thus are binding and only subject to judicial review under the arbitrary and capricious standard.

The third item is if the answer to 1 is yes, should the Commission modify Ex Parte MC-177 to provide that the Commission will accept negotiated rates cases without court [26] referrals, and the fourth item, should the Commission continue to handle negotiated rates cases on a case by case basis.

COMMISSIONER PHILLIPS: Madam Chairman, before you do that, could I ask a procedural question of General Counsel Burk? Specifically, could you let us know whether or not reopening of MC-177 would be appropriate and whether we would require any type of additional comment, notice, or anything.

MR. BURK: It would be appropriate. It would not require additional comment. You are clarifying what you have already stated. It doesn't require any taking of comment from other people to let the public know what it is you meant by 177.

COMMISSIONER PHILLIPS: Thank you.

CHAIRMAN GRADISON: Is the Commission prepared to vote?

VICE CHAIRMAN SIMMONS: Yes.

CHAIRMAN GRADISON: Madam Secretary?

SECRETARY MCGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY MCGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY MCGEE: Commissioner Andre?

COMMISSIONER ANDRE: Yes.

SECRETARY MCGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

[27] SECRETARY MCGEE: Chairman Gradison?

CHAIRMAN GRADISON: Yes.

[Questions 1 to 4 answered in the affirmative, 5 to 0.]

CHAIRMAN GRADISON: Now with regard to item 5, I've made my position clear. Are there any other comments on item 5?

[No response.]

CHAIRMAN GRADISON: Hearing none, please call the role.

SECRETARY MCGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY MCGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY MCGEE: Commissioner Andre?

COMMISSIONER ANDRE: No.

SECRETARY MCGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

SECRETARY MCGEE: Chairman Gradison?

CHAIRMAN GRADISON: I vote no because I would prefer to go ahead and respond with a rule at this time in addition to handling these cases on a case by case basis.

[Question 5 answered in the affirmative, 3 to 2.]

CHAIRMAN GRADISON: Item number 6, if negotiated rate cases will continued to be handled on a case by case basis, [28] should the Commission direct the Offices of General Counsel, Proceedings and Hearings to develop a flexible docket management plan that will provide for the participation of the Commission's administrative law judges in resolution of negotiated rate cases.

SECRETARY MCGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY MCGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY MCGEE: Commissioner Andre?

COMMISSIONER ANDRE: No.

SECRETARY MCGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

SECRETARY MCGEE: Chairman Gradison?

CHAIRMAN GRADISON: I vote no. I think that we can handle this on a regular case by case basis, and that a vote is not required to include administrative law judges in the processing of cases should we choose to do so at a later date.

[Question 6 answered in the affirmative, 3 to 2.]

CHAIRMAN GRADISON: The Commission has tried yet again to take an action with regard to our negotiated rates problem. A draft decision reflecting today's vote will be prepared and circulated for notation voting. With that—

COMMISSIONER PHILLIPS: Madam Chairman?

CHAIRMAN GRADISON: Yes?

[29] COMMISSIONER PHILLIPS: I would like to just take this opportunity to thank my colleagues, my staff and the Commission staff for all their help in this process.

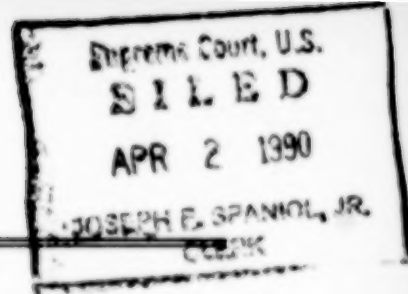
CHAIRMAN GRADISON: Thank you, Commissioner Phillips. Are there any other closing statements?

[No response.]

CHAIRMAN GRADISON: Hearing none, this hearing is adjourned.

[Whereupon, at 10:39 a.m., the hearing was adjourned.]

No. 89-624



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *ET AL.*
v.
PRIMARY STEEL, INC.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

JOINT BRIEF FOR AMICI CURIAE
IN SUPPORT OF RESPONDENTS

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April, 1990

BEST AVAILABLE COPY

QUESTION PRESENTED

In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its tariff charges, does a shipper have a legal defense that it is entitled to pay less than the carrier's published rates filed with the Interstate Commerce Commission, where a district court upholds an ICC ruling that collection of the tariff charges would be an unreasonable practice in violation of the Interstate Commerce Act?

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On Writ of Certiorari to the
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**JOINT BRIEF FOR AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

The National Industrial Transportation League, National Small Shipments Traffic Conference, Inc., Health and Personal Care Distribution Conference, Inc. and National Association of Manufacturers (herein referred to as "Shipper Associations"), pursuant to Rule 37.3 of the Rules of this Court, submit this joint brief as *amici curiae* in support of respondents. All parties have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The membership of The National Industrial Transportation League ("League") is comprised of approximately 1300 shippers and groups and associations of shippers conducting industrial and/or commercial enterprises, large, medium and small, in all states of the Union. The members of the League are substantial users of transportation by motor common carrier. It is estimated that League members, directly or indirectly, are responsible for

the routing of approximately 80 percent of the nation's freight.

National Small Shipments Traffic Conference, Inc. is an association with approximately 275 shipper members throughout the United States. The Health and Personal Care Distribution Conference, Inc. has a membership of approximately 70 companies which manufacture and ship drugs, medicines and personal care items throughout the nation. The members of these Conferences ship primarily via motor common carriers.

National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of all the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in the resolution of the issue of unjustified claims arising from rates negotiated with the motor carriers that serve their members.

The Shipper Associations, *inter alia*, participate actively before administrative, judicial and legislative bodies to protect the interests of their shipper members. The League, with the support of the other Shipper Associations and the shipping community in general, petitioned the Interstate Commerce Commission ("ICC") to institute Ex Parte No. MC-177, *The National Industrial*

Transportation League – Petition for Rulemaking – Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986), *clarified and modified*, 5 I.C.C.2d 623 (1989) [hereafter cited as "*Negotiated Rates*"]. In these decisions, the ICC adopted a policy stating that it would consider, on a case-by-case basis, whether it would be an unreasonable practice, and thus a violation of the Interstate Commerce Act, for a motor common carrier to collect an asserted undercharge claim when the claim arose because of the carrier's failure, due to oversight, misfeasance or malfeasance, to publish tariffs reflecting rates agreed to with the shipper, when the carrier had represented to the shipper that the agreed-to rates were in fact the legally effective rates. The Eighth Circuit's decision under review involves the application of the ICC's policy statement to the facts of a particular case.

The National Industrial Transportation League, National Small Shipments Traffic Conference, Inc., The Health and Personal Care Distribution Conference, Inc., and the National Association of Manufacturers, as *amici curiae*, support the respondents in this case.

STATUTES INVOLVED

In addition to the statutes cited in the briefs of petitioners and supporting *amici*, this case involves 49 U.S.C. §11705(b)(3); §11706(c)(2).

Section 11705(b)(3) provides:

A common carrier providing transportation or service subject to the jurisdiction of the

Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

Section 11706(c)(2) provides:

A person must begin a civil action to recover damages under section 11705(b)(3) of this title within 2 years after the claim accrues.

SUMMARY OF ARGUMENT

The Interstate Commerce Commission has been given statutory authority to determine if a particular course of conduct by a motor common carrier is an unreasonable practice that violates the Interstate Commerce Act. Recognizing the fundamental changes occurring in the motor carrier industry, the ICC made a finding that it would be an unreasonable practice to allow the collection of a higher tariff rate than the rate agreed upon when a motor carrier provided transportation services after offering that rate to a shipper who relied, in good faith, on an understanding that the carrier would file the agreed rate in a tariff at the ICC.

When the ICC determines that a particular course of conduct by a motor carrier is an unreasonable practice, the Act allows a shipper to recover damages for the injury caused by the violation. Under the doctrine of primary jurisdiction, any court considering a claim that a motor carrier's conduct is an unreasonable practice must refer that issue to the

ICC for consideration before determining whether damages should be awarded.

ARGUMENT

A. The Commission Has Correctly Construed Its Statutory Authority to Determine Whether Rates Claimed as Undercharges Are Unreasonable or Are Based Upon Unreasonable Practices.

What is at stake in this case is the interplay between two separate provisions embraced in a single statutory scheme, the Interstate Commerce Act. On the one hand, there is a provision which states that a carrier shall file its rate in a tariff with the Commission. On the other hand, in equally plain language, another provision states that all filed rates and the practices which affect them must be reasonable. It is entirely appropriate that the agency charged with the responsibility for administering the statute be given due deference to interpret and balance those provisions. Since the Commission has adequately considered and reasonably balanced two sections of the Act committed to its jurisdiction, its construction of the statutory scheme is entitled to deference. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, ___, 100 L.Ed.2d 313, 324 (1988); *Chevron, U.S.A., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

Petitioners rest their case upon the premise that, when motor carriers claim that undercharges are due from their shippers, under the filed rate section of the Interstate Commerce Act (Act), 49 U.S.C. §10761(a), such charges are collectible

whether or not they are based upon rates that are being charged as a result of unreasonable practices. They concede that, under the Act, rates and practices must be reasonable.¹ But they argue that the Commission must remedy unreasonable practices before a shipment is made and that, once a shipment moves, there is no remedy for an unreasonable practice. Stripped to its bare essentials, the petitioners are claiming a statutory right, if only by default, to collect rates that are a result of unreasonable practices.

However, the Interstate Commerce Act is a balanced statute. It gives the carrier the responsibility to publish and collect the rates in its

¹ Although elsewhere largely denied, petitioners at one point do recognize that the statute contemplates that a lawful unfilled rate can prevail over an unlawful filed rate:

Congress has provided a comprehensive scheme of rate regulation and has seen fit in limited and narrow circumstances to specifically define instances where the filed rate provisions are not applicable.

Petitioners' brief, p. 8. Even this begrudging concession exceeds that of the *amici* supporting petitioners' cause who argue uniformly that a filed rate is utterly inviolate and beyond the basic and fundamental scrutiny of the ICC. But in elevating the filed rate to singular importance, petitioners' *amici* ignore or fail to understand basic transportation law and logic: "reparations proceedings inevitably involve a refund [or waiver] from published tariffs regardless of any provision in the Act preventing the carrier from making such refunds [or waiver] personally. *Middlewest Motor Freight Bureau, Inc. v. United States*, 433 F.2d 212, cert. denied, 402 U.S. 999 (1971).

tariff, but also requires that such rates be reasonable and not be affected by an unreasonable practice. Compare 49 U.S.C. §10761(a) with 49 U.S.C. §10701(a). The court of appeals correctly applied *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915), in which this Court clearly articulated the classic statement that, on the one hand, a shipper was not permitted to deviate from a carrier's published tariff rate, but that, on the other hand, a shipper could have the published rate set aside by invoking the reasonableness jurisdiction of the ICC.² Accord *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 453 (1945); *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932) *Keogh v. Chicago & N. W. Ry. Co.*, 260 U.S. 156, 163 (1922).

Vast numbers of rates are now being filed at the Interstate Commerce Commission every day. Because rates may be, and regularly are, filed at the Commission on one day to become effective the next, the shipper, as a practical matter, must depend

² In addition to the opinion on review, the Ninth Circuit has affirmed application of the Commission's policy statement in *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016, 1028 (9th Cir. 1990). In *Delta Traffic Service, Inc. v. Appco Paper & Plastics Corp.*, 893 F.2d 472, 475 (2d Cir. 1990), the court of appeals reversed and remanded a district court order that had declined to refer a negotiated rate claim to the Commission for a ruling on reasonableness.

upon the rate as quoted by the carrier.³ The shipper has no certain knowledge of the rates filed until after the shipment has moved.

If the prohibition against unlawful rates based on unreasonable practices were read out of the Act, this would confer a license upon aggressive collection agents, acting for bankrupt carriers, to create claims and pursue shippers unreasonably and relentlessly.⁴ That is exactly what is at stake in this case: the collection agents are claiming over \$100 million in freight rates that were never contemplated to be assessed on the shipments.⁵ Indeed, had these carriers attempted to assess such charges initially, the shipments would not have been tendered to them, because other carriers generally offered rates

³ In accordance with the Congressional policy of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (July 1, 1980), the ICC has allowed a wide variety of motor carrier price and service options to be offered, and allows rate discounts to be made effective on one day's notice. See *Negotiated Rates*, 5 I.C.C.2d at 631-634.

⁴ One amici brief in support of petitioners aptly describes what is currently occurring: collection auditors follow the practice of "sifting through" the accounts of bankrupt carriers. *Amici curiae* brief of Oneida Motor Freight, *et al.* at 2.

⁵ For example, one carrier alone, Overland Express, Inc., is alleging that it has \$20,000,000 in undercharge claims that it is pursuing. *Amicus curiae* brief of Overland Express, Inc. at 2.

at the same level as were originally billed and collected.⁶

The public policy arguments that petitioners assert are misstated. Petitioners argue broadly that shippers should not "secretly agree to rates different from those contained in a tariff ... [as such agreed rates would lead to] public injury for departures from lawful rates." Petitioners' brief at 7, 10.

But the Commission's policy statement is not designed to promote or protect "secret" rates.⁷ The Commission has concluded that an unreasonable practice finding can be made *only* in cases where the carrier offered a rate to the shipper and it was reasonably understood in good faith that the carrier would file that rate in a tariff with the Commission.⁸

⁶ In the instant case, Maislin offered to meet the rates of another carrier, P&NE Trucking, which had been handling the freight for Primary Steel. App. to Petition for Certiorari, p. 31a.

⁷ In the Commission's decision in *Negotiated Rates*, 5 I.C.C.2d at 631, it stated:

In fact, there has been nothing in the records of the cases we have reviewed to suggest that it was the intent of the parties to establish secret, discriminatory rates.

⁸ The Commission's policy statement articulated the elements for a finding of unreasonable practice to be:

a course of conduct consisting of: (1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being

If an agreement were made to keep rates a secret, neither the Commission nor these shipper groups would advocate statutory protection. But that is not the case here. Rather, the real "public injury" will occur if the bankrupt carriers and their agents are allowed to use the filed rate provision to realize windfall profits by collecting higher rates from shippers than those that were mutually understood to apply when the shipments were tendered.⁹

Petitioners embellish their "public interest" argument by asserting that the Commission's exercise of its unreasonable practice jurisdiction "is unfair to the remainder of the public which pays lawful tariff rates" because "[t]he dilemma now faced by recipients of secret rate agreements results from their own lack of diligence and ICC failure to enforce the rate [filing] provision of the statute." Petitioners' brief at 30. But it is not the isolated shipper engaged in unlawful practices who is being

lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payments at higher rates.

Negotiated Rates, 5 I.C.C.2d at 628, n. 11.

⁹ One amicus suggests that the rights of creditors under the Bankruptcy Code must be given preference. *Amicus curiae* brief Overland Express, Inc., at 16-18. But if the motor carrier in whose shoes the creditors and bankruptcy trustee stand had no right under the Interstate Commerce Act to collect these rates, then the creditors can have no better rights.

confronted with these undercharge claims. Every regular customer of the trucking industry is being billed with huge undercharge claims, on shipments made years ago, by collection agents creating freight claims after carriers become bankrupt.¹⁰ Many members of these *amici* associations, which comprise the mainstream of American industry, has been presented with freight claims of this type; and the amounts claimed are growing as additional carriers file for bankruptcy.

What all these claims have in common is that every one of them is premised upon an alleged mistake or omission by the carrier itself. And such claims are brought against shippers whose dealings with the motor carriers fully contemplated that the rates would be filed with the Commission and *not* kept "secret." The shippers acted in good faith reliance that the rates quoted had been or would be

¹⁰ A review of a selection of the cases decided by the ICC shows that a broad cross-section of businesses are involved in negotiated rates cases. *Amici curiae* brief of Oneida Motor Freight, *et al.*, App. A. Oneida contends that these cases demonstrate an undue proclivity at the Commission to rule in favor of shippers in negotiated rate cases. *Id.*, at 14-15. In fact, the total of \$3 million in undercharges found unreasonable by the Commission in *all* cases presented to it is but a fraction of the \$20 million in under charges being pursued by just a *single* bankrupt carrier. *Amicus curiae* brief of Overland Express, Inc., p. 2. Thus, what the appendix demonstrates is that only a very small portion of undercharge claims are actually litigated under the Commission's policy statement and these cases tend to be ones where the shippers' can prove an unreasonable practice.

published by the carrier, as required by law, for their account prior to the date of shipment.

Petitioners also misstate what the Commission finds to be an "unreasonable practice." They argue that the assertedly unreasonable practice "is the enforcement of a lawful tariff." However, the unreasonable practice consists of the attempt to collect tariff rates at which a shipper did not and would not have tendered the shipment, instead of the rate at which the shipment was tendered and billed. It is worth noting that the historic "filed rate" cases cited by petitioners were rendered at a time when there was only one filed rate for all shippers between two points. Today, between any two points there is normally a plethora of rates for the same shipment. The ICC found this to be a reflection of the Congressional policy of allowing what, in an earlier era of a uniform rates between two given points, would have been viewed as discriminatory. *Negotiated Rates*, 5 I.C.C.2d at 625, 632-33.

Ironically, the "filed rate" which the bankrupt carrier seeks is usually a rate that no regular shipper paid at the time, as all receive some discount. *Negotiated Rates*, 5 I.C.C.2d at 632-33. Thus, rather than causing a discrimination by applying the agreed rate, the Commission is *preventing* the discrimination that would occur by imposing the higher filed rate. The policy considerations underlying the concern with "discrimination," which is the touchstone of the filed rate doctrine, now militate in favor of applying the agreed rate in the context of today's tariffs with shipper-specific rates.

B. Shippers Have a Cause of Action for Damages Caused by a Motor Carrier's Violation of the Interstate Commerce Act.

The Interstate Commerce Act provides a cause of action against motor carriers "for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle." 49 U.S.C. §11705(b)(3). This provision was recodified in 1978 from former section 204a(5) of the Act, 49 U.S.C. §304a(5) (1965).¹¹ Before recodification, it provided that:

The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 216(e) of this part, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

In the face of the statute and its history, petitioners argue that shippers faced with actions for undercharges have a defense available for unreasonably high rates but not for rates which

¹¹ Revised Interstate Commerce Act, 92 Stat 1451 (Oct. 17, 1978). Section 204a(5) was added by Pub. L. 89-170, §5, 79 Stat. 651 (1965).

result from unreasonable practices.¹² But it is clear from both the context and the legislative history of the Act, that the phrase “unjust and unreasonable” in former section 204a(5) was intended to encompass damages resulting from both unreasonably high rates *and* rates which were found to be “unjust” by the Commission due to a carrier’s unreasonable practices. Former section 216(a), 49 U.S.C. §316(a), now 49 U.S.C. §10701(a), imposed on motor common carriers the duty to establish and observe both reasonable rates and reasonable practices. In addition, former section 216(e), 49 U.S.C. §316(e) (which was specifically referred to in section 204a(5)), authorized the Commission to hear and decide complaints with respect to the unreasonableness of both the rates of motor common carriers and “any classification, rule, regulation or practice ... affecting” such rates (emphasis added).

Petitioners contend that a rate is “unjust and unreasonable” within the meaning of the reparations statute only if the rate exceeds a reasonable maximum. Such a view incorrectly suggests that shippers have no post-shipment remedy in damages for any other violation of the duties imposed on motor common carriers by the Act. This is an unacceptably cramped view of the ICC’s long-standing authority to prohibit carriers from

¹² This contention was not considered or decided in this case by either the court of appeals or the district court because petitioners present it here for the first time. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (Court does not consider questions not raised in court of appeals.)

extracting rates that are unjust and unreasonable because of a related but unlawful rule, classification or practice.

The legislative history of the 1965 amendment discloses Congressional intent to enact a motor carrier reparations provision that differed from the existing rail carrier reparations provisions, *but not* in the manner asserted by petitioners. The 1965 amendment was deemed necessary because of this Court’s decision in *T.I.M.E. Inc. v. United States*, 359 U.S. 464 (1959), which led the ICC repeatedly to “recommend that sections 204a and 406a be amended to make common carriers by motor vehicle and freight forwarders, respectively, liable for the payment of damages in reparation awards to persons injured by them through violations of the [A]ct.”¹³

The House Report accompanying H.R.5401 cogently explains the purpose of the legislation. Shippers using rail or water carriers traditionally “have had a procedure for securing damages arising from violations of the Interstate Commerce Act either by way of complaint filed against the carrier with the Commission or in the courts, while those shipping by motor carrier or freight forwarder had assumed they had a similar, though more limited, remedy by proceeding against the carrier in the

¹³ 74th Annual Report of the Interstate Commerce Commission, p. 190 (1961). The same recommendation was made in the Commission’s 75th Annual Report, p. 192 (1961); 76th Annual Report, p. 203 (1962); 77th Annual Report, at 19-20 (1964); 78th Annual Report, p. 70 (1964).

courts. In a 1959 Supreme Court decision [*T.I.M.E.*] this latter *procedure* was taken away, the Court holding that neither the courts nor the Commission had authority in this area."¹⁴

In order to respond to T.I.M.E., two types of proposals were put before Congress. "Some proposals have looked toward making the *procedures* identical in the case of all modes of transportation. Other proposals suggest return simply to the pre-1959 modified reparations for motor carriers and freight forwarders in view of the potentially large number of claims to which they might be subject owing to the predominant carriage of small shipments."¹⁵ Congress adopted the latter approach, a scheme that, in effect, "would permit a court of competent jurisdiction to award reparations to persons *injured through violations of the Interstate Commerce Act* by motor carriers and freight forwarders subject thereto."¹⁶

¹⁴ H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 2923, 2925 (emphasis added). *See also Informal Procedures for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403, 413 (1969).

¹⁵ H.R. Rep. No. 253, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 2923, 2925 (emphasis added).

¹⁶ *Id.* (emphasis added). 49 U.S.C. §11706(c)(2) (former 49 U.S.C. §304a(2)), provides authority for a civil action to be commenced to recover the damages authorized by §11705(b)(3).

In contrast, petitioners' "cut and paste" version of the legislative history attempts to depict a distinction between reparations for unreasonably high rates and reparations for other violations of the Act. Petitioners' brief at 21-24. In fact, the only distinction between these competing bills was *procedural*. The Commission favored giving shippers the option to file a complaint with (and receive a self-enforcing reparations order from) the ICC itself or to file a civil action. In contrast, under S.1727 and H.R.5401, shippers were required to begin a court action with referral of administrative issues to the Commission. But the substance of the relief of the two approaches was the same.

Numerous interests testified before both the Senate and the House on the differences between the reparations provisions in S.1732 and H.R.5869, which were identical to the existing railroad reparations provisions, and those in S.1727 and H.R.5401, which were subsequently enacted into law.¹⁷ During hearings before the Senate, then-ICC Chairman Webb explained that S.1732 would provide shippers with the option of filing a

¹⁷ Bills to Amend the Interstate Commerce Act: Hearings on S. 1142 *et al.* Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, 89th Cong., 1st Sess. (1965) (hereinafter "Senate Hearings"). A Bill to Amend the Interstate Commerce Act So As to Strengthen and Improve the National Transportation System, and for Other Purposes: Hearings on H.R. 5401 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong. 1st Sess. (1965) (hereinafter "House Hearings").

complaint with the Commission or a suit in district court, whereas S.1727 would not authorize a shipper to file a complaint with the ICC. Chairman Webb indicated the Commission's preference for S.1732, but also noted that the Commission did not oppose sections 5 and 6 of S.1727.¹⁸

The legislative history demonstrates that the Commission was by no means alone in this view. Other governmental interests, shippers and competing modes similarly saw the distinction between the competing reparations provisions as limited to whether complaints could be filed directly with the Commission.¹⁹

Immediately after enactment, the Commission described the legislative proposals and its views on

¹⁸ Senate Hearings, at 62-63. The Commission made the same representations to the House. House Hearings, p. 31. Testimony at the hearings indicated that opposition to allowing motor carrier reparations claims to be filed directly with the Commission was attributable to a fear that the many less-than-truckload shippers using motor carrier services would file numerous and small reparations claims and that the filing of small claims would be deterred if it was necessary to institute a civil action in the courts. *See, e.g.*, Senate Hearings, at 78, 129; House Hearings, p. 69.

¹⁹ Senate Hearings, at 93-95, 129, 158; House Hearings, at 97, 187. Petitioners rely upon an excerpt of a letter from the Comptroller General (quoted by petitioners at pages 22-23 of their brief without citation) which appears in S. Rep. No. 387, 89th Cong., 1st Sess. 12-13. The letter concludes that "the method for obtaining reparations indicated in S. 1727 is not objectionable" although it "does not seem as economical or expeditious as that proposed in S. 1732." *Id.*

the import of the regulatory scheme ultimately adopted by Congress in its 79th Annual Report at 118-119 (1965):

S.1732 and H.R.5869 were introduced, upon request, to implement [the Commission's] recommendation. An amended version of these bills became part of H.R.5401 and S.1727. Sections 6 and 7 of H.R.5401 would permit a court of competent jurisdiction to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers and freight forwarders. The Commission recommended a broader provision; that persons injured through such violations be given the option either to file a complaint with the Commission or bring suit in the appropriate district court of the United States. Sections 6 and 7 of H.R.5401 became part of Public Law 89-170.

Petitioners also suggest that the present language in section 11705(b)(3), holding carriers liable for the imposition of rates found by the Commission to be in violation of the Act, cannot be read as being broader than the reparations provision of former section 204a(5). Petitioners' brief at 20 and n. 11. But it should be clear from the analysis of the 1965 amendments that even before the recodification in 1978, Section 204a(5) encompassed both unreasonable rates and unreasonable practices, and the 1978 recodification properly reflects that reading.

The Historical and Revision Notes in the legislative history of the 1978 Revised Interstate Commerce Act clarify the use of the terms "reasonable" and "discrimination" in the recodification.²⁰ Because a number of terms historically had been used interchangeably throughout the Act, the recodification substituted the term "reasonable" for "just and reasonable" and substituted "discrimination" for "preference," "prejudice," "advantage," and "disadvantage."²¹ The history of the recodification quotes the similar finding of the editors of the U.S. Code Service that the terms "unjust discrimination" and "preference and prejudice" have been "used in innumerable instances by the courts and by the Commission as interchangeable" and that there is "similar confusion" in the cases concerning the requirements that a carrier's rates be just and reasonable and that its classifications, regulations and practices be just and reasonable as well.²² In light of this traditional interchangeable use of these provisions, Congress, in the recodification act, appropriately substituted

²⁰ 49 U.S.C. §10101 (West Pamphlet 1989), *reprinted in* 1978 U.S. Code Cong. & Ad. News 3022-3023.

²¹ *Id.*

²² *Id.*

the words "to be in violation of" the Act for the existing broad definition of reparations.²³

Finally, that Congress intended to encompass both unreasonable rates and unreasonable practices in the 1965 amendments to the Act is supported by examining Congress' view of this Court's decision in *Hewitt-Robins, Inc. v. Eastern Freight-Ways*, 371 U.S. 84 (1962). In *Hewitt-Robins*, the Commission had found that misrouting was an unreasonable practice violative of the provisions of the Interstate Commerce Act. This Court subsequently held that the *T.I.M.E.* decision did not preclude the courts and the Commission (working together under the primary jurisdiction doctrine) from awarding reparations to shippers for such an unreasonable practice, since such judicial/administrative action did not involve the direct determination of the unreasonableness of a rate.²⁴

Congress noted that the amendments were designed to restore the procedures used by the ICC before *T.I.M.E.*, but not to affect the right of shippers to recover damages from misrouting under the *Hewitt-Robins* doctrine." H. R. Rep. No 253, 89th Cong. 1st Sess. 12-13, *reprinted in*, 1965 U.S.

²³ See Historical and Revision Notes, 49 U.S.C.A. §11705, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3200.

²⁴ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.* 302 I.C.C. 173, 174 (1957), *dismissed*, 187 F. Supp. 722 (S.D.N.Y. 1960), *aff'd*, 293 F.2d 205 (2d Cir. 1961), *rev'd*, 371 U.S. 84 (1962).

Code Cong. & Ad. News 2931. (See also House Hearings at 93-94.) Prior to this Court's decision in *T.I.M.E.*, for many years after enactment of the Motor Carrier Act of 1935, the Commission and the courts provided a reparations remedy to shippers for any violation of the Act by motor carriers, including violations of both unreasonable rates and unreasonable practices.²⁵ Since Congress clearly had no problem with continuing a remedy for one category of unreasonable practices, namely, misrouting under the *Hewitt-Robins* doctrine, it seems illogical that Congress would deliberately exclude from the remedies that it was providing to shippers remedies for other types of unreasonable practices. The legislative history set out in detail above confirms that Congress had no such narrow intent, but rather intended to provide a damages remedy for all unreasonable rates and all unreasonable practices.²⁶

C. The Commission and the Courts Each Have a Role to Play in Adjudicating an Unreasonable Practice Defense.

Congress has authorized the agency *alone* to make findings that form the basis of an award of

²⁵ See, e.g., *Bell Potato Chip Co. v. Aberdeen Truck Lines*, 43 M.C.C. 337, 341-344 (1944).

²⁶ If Congress had not enacted a statutory reparations remedy in 1965, the common law remedy approved in *Hewitt-Robins* for the unreasonable practice of misrouting would also encompass any other unreasonable practice by which a rate is sought to be collected.

damages to injured shippers in the form of reparations for unreasonable rates or practices. 49 U.S.C. §11705(b)(3); *Hewitt-Robins, Inc. v. Eastern Freightways, Inc.*, 371 U.S. 84 (1962). Likewise, it is abundantly clear that only the ICC may make a finding that a particular motor carrier practice is unreasonable, so as to preclude the collection of rates published in the otherwise applicable tariff. *ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-80 (1966); *Western Transportation v. Wilson & Co.*, 682 F.2d 1227, 1232 (7th Cir. 1982).²⁷

The court below, by referring the unreasonable practice defense raised by respondent Primary Steel to the ICC, recognized the right of shippers being sued by a carrier for undercharges to oppose the claim with a defense that it would be unreasonable under the Act to permit the collection of the otherwise applicable tariff charges. See *ICC v. Atlantic Coast Line R. Co.*, *supra*;²⁸ *United States v. Western Pacific R. Co.*, 352 U.S. 59, 62-65

²⁷ An order authorizing waiver of undercharges is the equivalent of a determination of the amount of reparations or damages. *Informal Procedures for Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403, 414 (1969). See also *Arkansas Fertilizer Co. v. United States*, 193 F. 667 (Comm. Ct. 1911).

²⁸ This case also notes that the limited judicial review sought by any party aggrieved by an ICC's decision after referral is conducted by the referring court, where an action must be commenced against the agency within 90 days after entry of its decision. 28 U.S.C. §1336; *Burlington Northern, Inc. v. Northwestern Steel & Wire*, 794 F.2d 1242, 1246-47 (7th Cir. 1986).

(1956); *General American Tank Car Corp. v. El Dorado Term. Co.*, 308 U.S. 422, 432-33 (1940); *Seaboard System R. Co. v. United States*, 794 F.2d 635, 637-8 (11th Cir. 1986).²⁹

The petitioners contend that the courts should have refused to follow the primary jurisdiction doctrine and refer a reasonable practice question raised by the shipper to the ICC. As discussed above, that argument elevates 49 U.S.C. §10761 and the requirement that a filed tariff rate be observed to a role of primacy not found in the Interstate Commerce Act. Unlike some other federal regulatory statutes, the Act now clearly provides for an award of damages in the form of reparations to a shipper for past unlawfulness. This is a critical difference, for example, in considering petitioners' contention that *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), precludes referral of negotiated rates claims to the ICC. Both then and now, the Federal Power Act, unlike the Interstate Commerce Act, has no provision for an award of reparations for past unlawfulness. 16 U.S.C. §§824-824k. The courts could not refer a damage claim to the then-Federal Power Commission for consideration when neither the agency nor the court could award such damages.

²⁹ In this case, the Eleventh Circuit approved an ICC finding that the tariff at issue must be considered unambiguous and, therefore, stated the rate otherwise applicable under 49 U.S.C. §10761, but nonetheless affirmed the ICC's finding that it would be an unreasonable practice to allow the carrier to collect the additional freight charges. 794 F.2d at 637-38.

341 U.S. at 250-52. Consequently, the enactment of a motor carrier reparations provision in 1965 renders petitioners' heavy reliance on this Court's decisions in *T.I.M.E.* and *Montana-Dakota* entirely misplaced.

This Court has regarded "the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation to be of continuing public concern." *United States v. Western Pacific R. Co.*, *supra*, 352 U.S. at 63. In light of the pending petition for a writ of certiorari in No. 88-1958, *Supreme Beef Processors, Inc. v. Yaquinto*,³⁰ and in order to provide a clear direction as to the nature of that relationship for the benefit of all of those courts considering this and similar cases, the Court should reiterate the correct application of the primary jurisdiction doctrine.

³⁰ The issue in that case is whether the court of appeals decision in *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388 (5th Cir. 1989), correctly refused to refer a negotiated rates case to the ICC.

CONCLUSION

The decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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**BRIEF OF
SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC.
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

Shippers National Freight Claim Council, Inc. ("SNFCC"), pursuant to Rule 37 of the Rules of this Court, as its *amicus curiae* brief,¹ states as follows:

INTEREST OF AMICUS

SNFCC is a voluntary, not-for-profit organization, incorporated under the laws of the State of New York, with offices in Huntington, New York. The purpose of SNFCC is to assist its approximately 700 member firms throughout the nation in managing freight claim functions. While "freight claims" frequently involve disputes between shippers and carriers over lost and damaged cargo, they also may encompass transportation pricing disputes—for example, claims by shippers against carriers for reimbursement of "overcharges" or, as pertinent here, "undercharge" claims by carriers against shippers. SNFCC member firms utilize all modes of freight transportation in domestic and international commerce, including motor common carriers regulated by the Interstate Commerce Commission ("ICC" or "Commission").

SNFCC thus has a direct interest in the issues presented herein. It supports the position of respondent, Primary Steel, Inc. ("Primary"), and of the United States that the Eighth Circuit properly affirmed the district court's grant of summary judgment in favor of Primary, a shipper faced with undercharge claims by a bankrupt motor carrier.

Many of SNFCC's member firms have been subjected to similar undercharge claims by defunct motor carriers and their rate auditors or collection agencies. To assist its members in defending against these claims, SNFCC has formed Joint Defense Groups in more than 40 carrier bank-

¹ Written consent to file this *amicus* brief has been granted by the Solicitor General and, through counsel, by petitioners and respondent.

ruptcy and insolvency cases. (See Appendix A hereto.) Collectively, the suits being handled within SNFCC's Joint Defense Groups seek more than \$9 million from close to 700 defendants. Counsel for the largest collection agencies has estimated that the amount at stake in all cases presenting similar issues is approximately \$200 million.²

SNFCC previously addressed similar issues in its *amicus curiae* brief filed with this Court on June 30, 1989, supporting a grant of certiorari in *Supreme Beef Processors, Inc. v. Yaquinto*, No. 88-1958.³ In essence, SNFCC argued that:

1. Economic regulation of the motor carrier industry was substantially liberalized by the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793 (effective July 1, 1980), and by subsequent changes in ICC policies and regulations designed to implement congressional intent to create a more competitive motor carrier industry.

2. The intensified competition caused carriers to negotiate discounted transportation rates, many of which, unbeknownst to the shippers, were not included in the carriers' tariffs filed with the ICC.

3. In response to the hundreds of lawsuits filed by collection agencies for defunct carriers, seeking to collect the difference between filed tariff rates and negotiated discount rates, the ICC properly exercised its rarely used reasonable practices jurisdiction under 49 U.S.C. § 10701(a) (1982). In so doing, the agency properly ruled that it would constitute an unreasonable practice for a carrier to collect

² See Joint Motion of the Debtor and Official Creditors' Committee to Employ Secondary Freight Undercharge Auditors and to Authorize Support For the Creditors' Alliance to Protect Freight Undercharge Assets, Exhibit B at 1, filed Aug. 15, 1989 in *In re Overland Express, Inc.*, Case No. 1P88-3004 RA(J) (Bankr. S.D. Ind.).

³ SNFCC understands that this Court is holding review of the Fifth Circuit's decision in *Matter of Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), in abeyance pending its decision in the instant case, as suggested by the Solicitor General. Brief for the Federal Respondent, filed herein on Dec. 18, 1989 ("Fed. Resp. Br.") at 13.

more than the rate negotiated in good faith by an authorized carrier representative upon which the shipper relied. *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("Negotiated Rates I"), clarified, 5 I.C.C.2d 623 (1989) ("Negotiated Rates II") (collectively, "Negotiated Rates").

4. This Court has declared that only the filed tariff rate may be charged "unless it is found by the Commission to be unreasonable." *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). *Accord, Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 162 (1922).

5. The legally published tariff rate is lawful only if it is reasonable. *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932).

6. The issue of reasonableness of a carrier's rate requires referral to the ICC when raised either in an action for reparations or by way of a defense to an undercharge claim. *United States v. Western Pac. R.R.*, 352 U.S. 59, 71 (1956); *Seaboard Sys. R.R. v. United States*, 794 F.2d 635, 639 (11th Cir. 1986).

7. The ICC's primary jurisdiction over reasonableness issues extends to motor carriers' rate-related practices as well as to the rates themselves. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87-88 (1962); *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940).

8. The procedure established for judicial reference of motor carrier rate and practice issues to the ICC is available for past shipments. *National Motor Freight Traffic Ass'n v. United States*, 268 F.Supp. 90, 92 & n.3 (D.D.C. 1967), *aff'd mem.*, 393 U.S. 18 (1968).⁴

⁴ Because these points will be amply addressed in the briefs of the principal parties herein, SNFCC will not revisit them extensively here. In keeping with recently revised Rule 37.1, SNFCC instead will use these pages primarily to set forth its members' perspective on the trucking industry conditions which spawned the undercharge problem.

As Appendix A to its previous *amicus* brief, SNFCC presented descriptions, in digest form, of unreasonable carrier practices which had come to its members' attention since passage of the MCA. Appendix B to that brief listed 82 carriers which had sued shippers for undercharges, and Appendices C and D listed citations to scores of conflicting lower court decisions on the issue, the majority of which supported the ICC's policy statement in *Negotiated Rates*.

Since the filing of SNFCC's previous *amicus* brief, the list of carriers claiming undercharges has grown from 82 to 122. (See Appendix A to this brief.) In addition, in line with the Eighth Circuit's decision under review herein and the Eleventh Circuit's decision in *Seaboard Sys. R.R. v. United States*, 794 F.2d 635 (11th Cir. 1986), four more courts of appeals have recently rendered decisions in eight undercharge cases supporting the ICC's exercise of its reasonable practices jurisdiction in the post-1980 regulatory environment.⁵ The Fifth Circuit's decision in *Matter of Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (1989), stands alone in refusing to acknowledge the Commission's primary jurisdiction in these cases.

The decision under review, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989), *cert. granted*, 110 S. Ct. 834 (1990), involves only one of thou-

and which amply warranted the harmonization of longstanding statutory objectives achieved by the Commission in *Negotiated Rates*. SNFCC believes these observations will bear directly on the question of whether the Commission properly has exercised the discretion accorded agencies to balance broad and potentially conflicting statutory policies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁵ *Delta Traffic Serv., Inc. v. Appco Paper & Plastics Corp.*, 893 F.2d 472 (2d Cir. 1990); *Carriers Traffic Serv., Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989) (embracing *Inman Freight Systems, Inc. v. Boise Cascade Corp.* and *Orachels Bros. Truck Lines, Inc. v. Cooper Indus., Inc.*); *INF, Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989); *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir. 1990) (embracing *Delta Traffic Serv., Inc. v. Marine Lumber Co.*); *West Coast Truck Lines, Inc. v. American Indus., Inc.*, 893 F.2d 229 (9th Cir. 1990).

sands of undercharge cases now pending before the lower courts and awaiting this Court's decision on the Commission's reasonable practices jurisdiction. Some courts have formally stayed all such proceedings pending this Court's decision.⁶ *Maislin* involves relatively simple factual and legal circumstances common to virtually all pending undercharge cases, *i.e.*, the parties negotiated rates or discounts with the understanding that they were or would be duly published in the carrier's tariff, but years later a third party (auditor or collection agency) claims that the carrier failed to file the agreed-upon rates in its tariff, thus arguably creating a technical undercharge under the "filed rate doctrine" of *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94 (1975).

To comprehend the magnitude of the problem confronting the Commission in its *Negotiated Rates* decisions, this Court is urged to consider the *total* transportation environment following enactment of the MCA as related hereinafter. SNFCC, drawing on the experience and expertise of its membership, believes it is uniquely equipped to assist the Court in understanding how the current undercharge issues arose, and why the corrective action taken by the ICC is not only a lawful but a commendable example of regulatory flexibility.

SUMMARY OF ARGUMENT

The undercharge issue requires the ICC to harmonize the requirement of 49 U.S.C. § 10701(a) (1982) that motor common carrier rates and related practices must be "reasonable" with the requirement of 49 U.S.C. § 10761(a) (1982) that motor common carrier rates must be published in tariffs. The MCA modified neither of these requirements; neither one may be implemented to the exclusion

⁶ See, *e.g.*, *Carolina Motor Express, Inc. v. Delaware Valley Shippers Ass'n*, No. 89-3259(L) (4th Cir. Feb. 1, 1990); *In re McLean Trucking Co.*, Case No. C-B-86-023 (Bankr. W.D.N.C. entered Nov. 17, 1989) (administrative order staying activity in undercharge cases) (involving approximately 1,700 cases).

of the other. When a statute imposes broad and potentially conflicting requirements such as these, a regulatory agency's discretion to construe them harmoniously is at its "zenith." *Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 314 (D.C. Cir.) (per curiam), cert. denied, 474 U.S. 1019 (1985). The agency may change its construction of its governing statutes, even to the point of reviving previously dormant regulatory powers, so long as the change in its policy is rational and well-articulated. *United States v. Morton Salt Co.*, 338 U.S. 632, 647-48 (1950).

The ICC's accommodation, in its *Negotiated Rates* decisions, of the requirement for reasonable rates and related practices with the co-equal requirement for tariff publication is rational and well-articulated. More than that, it is a laudable example of the flexibility this Court has described as not only permissible but necessary for regulatory agencies. See *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

Indeed, the radical changes in the regulatory and competitive environment of the trucking industry during the last decade ultimately compelled the ICC to re-activate its authority to police unreasonable rate-related practices. From the perspective of SNFCC's members, these changes included not only the statutory revisions wrought by the MCA itself but also a host of regulatory actions affecting the mechanics of tariff filing under 49 U.S.C. § 10762 (1982), which had the effect of vastly increasing the number of tariff filings while reducing their accessibility and utility to shippers. These changes, against a background of widespread press reports and well-meaning statements by former regulators extolling the displacement of regulation by market forces in the trucking industry, fostered a widespread misperception in the shipper community that the MCA had totally deregulated motor carrier rates, and also led to widespread carrier disregard of the remaining tariff requirements. Thus, the concept of absolute constructive notice concerning all tariff filings—which petitioners' interpretation of the filed rate doctrine would

continue to impose on all motor carrier shippers—became utterly divorced from reality over the past decade.

Here, as in numerous other undercharge cases, all that the ICC has done is to determine where the loss should fall when a carrier goes out of business after consistently failing to apprise shippers of its tariff rates, and consistently misleading shippers by negotiating and accepting payment at a lower rate. In addition to determining that the carrier's later attempt to collect under the tariff rates it previously disregarded is indeed an unreasonable practice in violation of Section 10701(a), the agency has determined that any resulting economic loss should be borne by the carrier who violated the tariff publication requirement of Section 10761(a) rather than by the unsuspecting shipper. At the same time, however, the ICC's decisions show that it has been careful to limit its new policy to situations where the shipper demonstrably relied on a negotiated rate. How this deft and even-handed accommodation and vindication of both of the relevant statutory policies serves to undermine or nullify Section 10761(a), as claimed by petitioners (Pet. Br. at 26, 29), is not readily apparent. If the ICC is empowered to harmonize the two pertinent statutory provisions in this fashion, it follows that the court below had the power and the duty to refer this case for a reasonableness determination that only "the Commission" can make. See 49 U.S.C. § 11705(b)(3) (1982).

The circumstances of this case—and the thousands of undercharge cases presenting similar facts—amply illustrate why this Court tempered its statement of the filed rate doctrine in *Louisville & N.R.R. v. Maxwell*, 237 U.S. at 97, with the qualification that the filed rate must be charged and paid "unless it is found to be unreasonable." The actions of the Commission and the courts in the case under review are entirely consistent with the filed rate doctrine as so qualified. As aptly stated by the Solicitor General, "this Court's many decisions holding that a court may not permit an equitable defense to override the carrier's right to collect the filed rate do not affect the Commission's power to implement the statutory requirement

of reasonableness." (Fed. Resp. Br. at 7 (emphasis in original).) This same distinction permits early retirement of the "equitable defense" straw man with which petitioners continue to joust. (See, e.g., Pet. Br. at 8, 12, 18.) The Commission in *Negotiated Rates II* disavowed its unfortunate references to equitable defenses in *Negotiated Rates I*—as it had every right to do under *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)—and properly based its resolution of negotiated rates issues on its power to correct unreasonable practices under 49 U.S.C. §§ 10701(a) and 10704(b)(1) (1982).

ARGUMENT

I. The Commission's Revised Policy On Negotiated Rates Is Well Within Its Broad Discretion To Harmonize The Tariff Publication Requirement With The Co-equal Requirement For Reasonable Practices Relating To Carrier Rates.

Because the district court referred this case to the ICC for consideration pursuant to the policies announced by the agency in *Negotiated Rates*, and then upheld Commission findings made pursuant to those same policies, this case necessarily turns on whether the Commission was empowered to adopt those policies. Answering that question in the negative, petitioners ascribe primacy to the long-standing requirement of Section 10761(a) that motor common carrier rates be published in tariffs. In so doing, petitioners emphasize that Congress did not disturb the tariff requirement when it enacted the MCA—ignoring the equally obvious fact that Congress likewise did not disturb the long-standing requirement of Section 10701(a) that motor common carrier rates and related practices must be reasonable in order to be lawful.

The problem before the Commission and this Court, however, cannot be resolved by sterile attempts to invent statutory hierarchies where none exist. The fact is that Congress neither anticipated nor addressed the question of how Sections 10761(a) and 10701(a) might be harmo-

nized in today's transportation environment, where shipper access to filed tariffs has become difficult at best (see *infra* Part II) and where carrier disregard of tariff requirements appears to have become rampant (see *infra* Part III). Here, as in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (footnote omitted), "Congress has not directly addressed the precise question at issue," so that "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Indeed, to the extent that the provisions of Sections 10701(a) and 10761(a) impose broad requirements that might appear facially in conflict, "the agency's interpretive domain is at its zenith and the judicial license at its nadir." *Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d at 314.

The factual parallels between *Central & Southern* and this case are instructive. There, the District of Columbia Circuit had to determine whether the MCA's generally applicable, pro-competitive revisions to the transportation policy of 49 U.S.C. § 10101(a) (1982) permitted the Commission to exempt all motor *contract* carriers of property⁷ from tariff filing requirements under provisions of 49 U.S.C. § 10761(b) (1982) that the MCA did not touch. As the District of Columbia Circuit noted, "legislative inaction" in that case was a "particularly ambiguous and unreliable indicator" because, "[w]hile Congress did not tamper with the tariff-filing requirements, neither did it amend the broadly-worded exemption provisions." 757 F.2d at 317. Under those circumstances, the Commission was entitled to considerable latitude in construing pre-existing statutory language by reference to the generalized transportation policy provisions that Congress did amend. *Id.* Because "[t]he Commission amply grounded its broad exemption in the newly-revised national transportation pol-

⁷ Contract carriers provide dedicated equipment and/or tailored service to particular shippers under separately negotiated terms and conditions (see 49 U.S.C. § 10102(15) (1982)), whereas common carriers normally service groups of shippers under standard terms and conditions.

icy," *id.* at 318, the exemption was sustained even though it was sharply at variance with the Commission's past practice of narrowly construing the contract carrier tariff exemption provisions of Section 10761(b).

Demonstrably, a similar application of the *Chevron* principle is appropriate here. It may be true that the transportation policy of Section 10101(a) is not an independent source of ICC rulemaking authority. See *Global Van Lines, Inc. v. Interstate Commerce Commission*, 714 F.2d 1290 (5th Cir. 1983). Here, however, Section 10101(a) surely provides the best available guidelines for harmonizing the statute's substantive commands regarding rate publication and reasonableness, and for applying them to current industry conditions. The Commission's *Negotiated Rates* decisions amply explain the transformed competitive and regulatory environment faced by motor common carriers and their customers, and amply justify the Commission's expanded use of its "reasonable practice" powers to address the undercharge problem. Because the Commission properly found "[t]he dogmas of the quiet past . . . inadequate to the stormy present," it necessarily had to "think anew and act anew."⁸ So long as the agency acted within the confines of Sections 10701(a) and 10761(a)—as it patently did—its actions were in the best tradition of agency regulation, which is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. at 416. The conditions which compelled the Commission to act are detailed in the next section of this brief.

II. The Commission's Exercise Of Its Reasonable Practice Jurisdiction With Respect To Negotiated Rates Was Warranted By Changed Industry Conditions After Enactment Of The Motor Carrier Act Of 1980.

The Commission's change of policy in its *Negotiated Rates* decisions, as implemented by the district court and

⁸ A. Lincoln, Second Annual Address to Congress (Dec. 1, 1862).

the Eighth Circuit in the case under review, is the logical end result of the radically transformed regulatory and competitive environment in which the motor carrier industry existed during the nineteen eighties. By describing how that transformation occurred, and how it eventually served to cripple many shippers' ability to access filed rates, SNFCC hopes to contribute uniquely to this record by demonstrating why events ultimately compelled the Commission to address the undercharge issue as it has.

In order thus to demonstrate the rationale behind the decisions in *Negotiated Rates*, SNFCC will address the changes wrought by the MCA itself; the even greater changes subsequently made by the ICC in its tariff filing regulations and procedures; the ensuing proliferation of tariff filings and the decreased utility of those filings to the shipping public; and the widespread resulting misperception—fed even by public statements of former ICC members—that the motor common carrier tariff filing requirement had become a dead letter. It will be SNFCC's purpose, in short, to delineate the reality behind the Commission's well-taken observation in *Negotiated Rates II* that it had become "extremely difficult for shippers to determine, prior to an initial movement, whether the agreed-upon rate is actually on file." 5 I.C.C.2d at 633.

A. The 1980 Act Reduced Market Entry Barriers And Called For More Pro-Competitive Enforcement Of Existing Motor Common Carrier Rate Regulations.

The primary objectives of Congress in the MCA were threefold. Congress sought to liberalize the Commission's regulation of entry into the motor carrier industry, and it also sought to reduce the role of antitrust-immune collectively made rates in setting industry price levels, while reemphasizing the promotion of competition as an objective of all ICC motor carrier regulations.

To open up entry into the industry, the MCA principally reduced the burden of proof imposed on applicants for motor carrier operating authority (§ 5), mandated an ex-

pedited procedure for broadening previously issued operating authorities (§ 6) and expanded previous exemptions from the requirement for operating authority (§ 7). With respect to motor carrier pricing, the MCA principally established a zone of ratemaking freedom within which common carrier tariff changes could not be protested (§ 11), expanded the ability of common carriers to offer limited liability rates (§ 12) and reduced the scope of antitrust immunity for collective ratemaking activities (§ 14). As already noted, however, the MCA eliminated neither the requirement that common carrier rates be filed in tariffs nor the requirement that such rates and related practices be reasonable. With respect to transportation policy generally, Section 4 of the MCA amended 49 U.S.C. § 10101(a) so as to require reemphasis of the role of competition in ICC administration of all aspects of motor carrier regulation, including those changed by other sections of the MCA as well as those not changed.

Thus, the MCA was not a measure for total deregulation of motor carriers. Rather, its intended effect might best be described as regulatory detente.

B. In An Effort To Implement The General Pro-Competitive Purposes Of The 1980 Act, The Commission Radically Altered Its Tariff Filing Regulations And Procedures.

Correctly anticipating that the reduced role for collective ratemaking in the motor carrier industry would lead to a proliferation of independent rate filings, the ICC adopted a series of regulatory changes intended, without doubt, to facilitate independent filings and foster price competition as mandated in Section 4 of the MCA. While the actual effects of some of these measures were less salutary than their intended effects (*see infra* Part II.C), the relevant point for present purposes is not the legality or propriety of the changes, but rather their existence in fact.

Among the earliest of the Commission's movements in this direction was its seemingly innocuous announcement in 1980 that it no longer would require newly authorized

motor carriers to certify that they had tariffs on file as a precondition to actual license issuance.⁹ This measure eliminated a major administrative tool for ensuring that the many new entrants attracted into the industry by the MCA would actually file tariffs before commencing operations.

As the pace of change in tariff filing regulations accelerated during the nineteen eighties, the Commission abolished tariff requirements for motor contract carriers;¹⁰ permitted common carriers to make reduced rate tariffs effective one day after filing;¹¹ allowed the filing of common carrier rates limited in their applicability to a single named shipper;¹² repealed regulations which had required tariffs to include alphabetical indexes of commodities and locations for which rates were named;¹³ abolished prior requirements that rate increases and reductions in newly filed tariffs be highlighted by special symbols;¹⁴ and permitted common carriers to make rates applicable to shippers identified in tariffs only by numerical codes, without including in the tariff any index decoding the numbers.¹⁵

⁹ *Rescission of Regulations Governing Certification of Rates or Fares Covering New Operating Authority*, No. 37013 (Sub-No. 1) (I.C.C. served Sept. 22, 1980).

¹⁰ *Exemption of Motor Contract Carriers From Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd sub nom. Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301 (D.C. Cir.) (per curiam), *cert. denied*, 474 U.S. 1019 (1985).

¹¹ *Short Notice Effectiveness for Independently Filed Motor Carrier and Forwarder Rates*, 1 I.C.C.2d 146 (1984), *aff'd sub nom. Southern Motor Carriers Rate Conference v. United States*, 773 F.2d 1561 (11th Cir. 1985).

¹² *Rates For a Named Shipper or Receiver*, 367 I.C.C. 959 (1984).

¹³ *Revision of Tariff Regulations, All Carriers*, No. 37321 (I.C.C. served Oct. 1, 1984), 1984 Fed. Carr. Cas. (CCH) ¶ 37,129.

¹⁴ *Tariff Improvement*, 1 I.C.C.2d 760 (1985).

¹⁵ *Outstanding Relief for "Shipper Account Codes"—Individual Motor Common Carriers and Freight Forwarders*, Special Tariff Authority No. 86-639 (I.C.C. decided Mar. 28, 1986).

Taken in combination, these changes in tariff regulations would have made it substantially more difficult for shippers to ascertain pertinent filed rates even if the volume of tariffs filed had remained at pre-1980 levels. As demonstrated next, however, the shippers' problem was compounded by a proliferation of such filings as regulatory detente took hold.

C. The Volume Of Tariff Filings In The New Environment Soon Overwhelmed The Commission's Reduced Staff And Impaired The Utility Of The Commission's Tariff Files.

Even prior to 1980, the ICC's administrative steps in the direction of reduced motor carrier regulation¹⁶ had prompted an increase in tariff filings. The Commission admittedly had found it difficult to keep pace with the filings and examine them for compliance with tariff regulations.¹⁷ This problem had led the Commission to announce on September 27, 1979 that it was discontinuing the practice of examining every filed tariff for compliance with its regulations.¹⁸ By early 1981, the Commission reported that "the volume of tariff matter received [had] caused the tariff library maintenance function to overwhelm the examination process."¹⁹

The deluge of new tariffs only increased after enactment of the MCA. Whereas a total of 397,024 tariffs had been filed with the Commission in fiscal year 1978,²⁰ tariff filings increased to 1,200,000 in fiscal year 1984.²¹ The number of carriers subject to the Commission's jurisdiction

¹⁶ See H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 13 (1980).

¹⁷ 1979 ICC Ann. Rep. 69.

¹⁸ *Tariff Integrity Board*, Ex Parte No. 367 (I.C.C. served Sept. 27, 1979), 1979 Fed. Carr. Cas. (CCH) ¶ 36,906.

¹⁹ 1980 ICC Ann. Rep. 65.

²⁰ 1979 ICC Ann. Rep. 69.

²¹ 1984 ICC Ann. Rep. 70.

grew during this period from 17,000 to over 36,000.²² At the same time, the practical availability and utility of filed tariffs to the shipping public was further reduced by the closure of the Commission's public tariff file effective September 14, 1981 (after which public users had to share the official tariff file room with Commission staff),²³ and by reduction of the ICC's budget for tariff maintenance and examination. For example, ICC staff hours devoted to examination of tariffs for compliance with regulations were slashed from 137,000 in fiscal year 1984 to an estimated 3,000 in fiscal year 1986,²⁴ even though the volume of tariff filings was increasing at an estimated rate of six percent per year.²⁵ Between fiscal years 1983 and 1985, staff years allocated to "Rate Regulation Activity: Motor" dropped from 41 to an estimated level of only 29.²⁶

The negative impact of budgetary and staff reductions on the Commission's ability to maintain the official tariff file is well illustrated in two recent pleadings filed by carriers and carrier trade groups before the ICC. In *Regular Common Carrier Conference—Petition for Declaratory Order—Range of Discounts and Customer Account Codes*, No. MC-C-30117, a trucking trade group petition submitted on July 12, 1988 demonstrates, through a sample of almost 40,000 tariff pages filed with the Commission in a single week (May 23 through 27, 1988) that the Commission's understaffed and overwhelmed Section of Tariffs has been accepting numerous "write-in" or "trigger" tariff filings

²² Testimony of Chairman Reese Taylor before the Government Activities and Transportation Subcommittee of the House Committee on Government Operations, Sept. 12, 1985.

²³ *Traffic World*, Sept. 7, 1981, at 34.

²⁴ Interstate Commerce Commission, Budget Estimates: 1986, at 55.

²⁵ *Id.* at 54. Other year-to-year comparisons during this period are rendered difficult by changes in presentation of Commission budget data from one year to the next.

²⁶ Interstate Commerce Commission, Budget Estimates: 1985, at 25. Between fiscal years 1979 and 1984, total ICC staff positions decreased from 2,040 to 1,158. 1984 ICC Ann. Rep. 119.

negotiated rates will be enormously helpful to the successful outcome of this litigation. Thank you, and I'm available for any questions you may have.

CHAIRMAN GRADISON: Thank you. Commissioner Phillips, I wonder if you'd take over at this point.

COMMISSIONER PHILLIPS: Thank you very much, Madam Chairman. As was mentioned, Chairman Gradison asked me to coordinate the Commission's efforts to establish a framework for discussing potential Commission action with respect to negotiated rates. In effort to develop a consensus on what further steps the Commission should take in this area, I have conferred individually with each of my colleagues.

I am pleased to report that we have identified several options, we have considered the Commission's experience to date under the existing interpretation of our MC-177 policy, the treatment of these cases by the courts, and the comments of the parties in [10] MCC-30090. My colleagues and I agree that further Commission action is needed.

We have identified six options. Before we discuss and vote on them, I would like to describe briefly each of these options. I believe that a consensus exists for the first four options. On the fifth option, dealing with the Commission's disposition of the NIT League's declaratory order petition, there now appears to be a difference of opinions among my colleagues.

Likewise, a consensus has not yet been reached on a sixth option, which concerns procedures by which the Commission would implement any decision taken here today. Despite the fact that we have not reached a consensus, the level of interest expressed by my colleagues on the sixth option made it desirable to include it for discussion.

The first option we have identified is to reopen on our own motion Ex Parte No. MC-177 for further clarification and enunciation of our policy regarding negotiated rates cases. As Director Mackall and General Counsel

Burk have pointed out, since our 1986 decision in Ex Parte MC-177 and subsequent clarifying decisions, the Commission has gained experience with negotiated rates cases. The Commission, as well as the courts, have decided a number of these cases.

This process has served to identify several areas in which the policy enunciated in MC-177 may require clarification [11] and strengthening. One of these areas, which General Counsel Burk has clearly described, is the split among the courts over the propriety of referring negotiated rates cases to the Commission. The split seems to stem, at least in part, from some misinterpretation of the Commission's statement in MC-177.

In that case, the Commission stated that it would provide advisory opinions on negotiated rates cases referred to us by the courts. Reopening MC-177 would permit the Commission to address this misinterpretation and to strengthen the policy outlined in MC-177. It would also allow us to establish primary jurisdiction over negotiated rates cases. Reopening MC-177 would also permit us to clarify other areas of our MC-177 policy, including whether the Commission will accept negotiated rates cases for decision without prior referral by the courts, and whether those cases should continue to be handled on a case by case basis.

If the Commission votes to approve the reopening of MC-177, our second option is to clarify that the Commission's opinions in negotiated rates cases will represent the exercise of its primary jurisdiction and thus are binding and only subject to judicial review under the "arbitrary and capricious standard."

This option is intended to address the split among the courts identified by the General Counsel and to strengthen the legal posture of shippers who seek to rely on the [12] Commission's MC-177 policy in obtaining relief in negotiated rates cases.

The third option we have identified is for the Commission to amend the policy outlined in MC-177, to permit Commission consideration of negotiated rates cases with-

out court referral. The purpose of this proposal is to provide an additional procedure by which shippers faced with potential undercharge claims could seek relief.

Under this procedure, a shipper who is notified of possible liability for undercharges claimed by a motor carrier could seek a declaratory order from the Commission determining whether collection of the alleged undercharges would be an unreasonable practice, even if the carrier had not instituted court proceedings.

The goal of this option is to encourage resolution of negotiated rates cases before cases are filed in the courts, to encourage private resolution during the pendency of cases that are filed, and to simplify those negotiated rates cases that do proceed to adjudication in the courts. This proposal is consistent with the Commission's authority under the Administrative Procedure Act; that is, to issue declaratory orders in order to terminate controversies or to remove uncertainties.

The fourth option is whether the Commission should continue to handle negotiated rates cases on a case by case [13] basis. In MC-C-30090, the NIT League and others have urged the Commission to adopt a declaratory order declaring in general terms the circumstances when the collection of alleged undercharges would constitute an unreasonable practice.

The NIT League's proposed solution offers a seemingly straightforward approach to negotiated rates cases. If adopted, however, it would leave the factual determination as to whether any particular set of facts amounts to an unreasonable practice to the courts.

In effect, the Commission would be called upon to exercise its expertise in determining what constitutes an unreasonable practice in only a generalized way. Therefore, it is not clear whether this approach would resolve the split among the courts as to the appropriate resolution of negotiated rates cases. Nor is it clear that this approach would be sufficiently persuasive to a court to increase the probability that a shipper making the types

of showings required by such a declaratory order would prevail.

For this reason, I believe there is sentiment among most Commissioners to continue to handle negotiated rates cases on a case by case basis. If the Commission votes to reopen and clarify Ex Parte No. MC-117, and to continue to handle negotiated rates cases on a case by case basis, a fifth option for the Commission's consideration is whether the petition in MCC-30090 should be held in abeyance for further consideration [14] based upon shipper, carrier and Commission experience following implementation of the initiative adopted by the Commission here today.

As I mentioned, the proposal for a declaratory order in MCC-30090 is a valid response to recent developments in negotiated rates cases. Accordingly, I do not believe that there is a consensus among my colleagues to deny the petition. As of last Friday afternoon when I circulated the voting sheet now before the Commission, there appeared to be a consensus in favor of holding the NIT League petition in abeyance at this time.

I have since been made aware that this is in fact no longer the case. However, it appears that there is a majority that believes that continued use of the case by case procedure may be more effective in obtaining favorable judgments in negotiated rates cases. By holding the petition in MCC-30090 in abeyance, the Commission will be able to assess the progress made under the policies we adopt here today and to reconsider adoption of the MCC-30090 petition if it appears desirable in the future.

The sixth option, also on which consensus has not been reached, concerns the mechanics of the Commission's implementation of the decisions we take today. Under current procedures, the negotiated rates case docket has been handled expeditiously by the Commission's Office of Proceedings. [15] However, if the Commission adopts the five options I just outlined, the potential exists for a greatly expanded case load.

Under this option, the Offices of General Counsel, Proceedings and Hearings would be directed to develop a docket management plan for the Commission's handling of future negotiated rates cases. This option is not intended to establish a burdensome new procedure for the handling of negotiated rates cases, or lead to the creation of new evidentiary requirements.

Rather, it is intended to ensure continued expeditious handling of these cases, regardless of the volume of cases received and to encourage the best use of Commission resources, including administrative law judges in meeting this goal. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you, Commissioner Phillips. Are there opening statements by any individual members of the Commission? Commissioner Lamboley?

COMMISSIONER LAMBOLEY: I guess I would be next. I want to—thank you, Madam Chairman. I want to commend Commissioner Phillips for the energy and consideration she's given to the problems that have been visited on the industries following our adoption of MC-177. I think that Commissioner Phillips has demonstrated considerable imagination and thoughtfulness in approaching the variety of problems and the [16] various options that one could consider as appropriate.

In this case, I think that for my own part, I'd feel very comfortable in voting yes for all of the options and I'll briefly say why. I think it's obviously important for us to reopen and clarify MC-177 to do three things at the outset. First, make clear that our claim to jurisdiction is one of primary, if not exclusive, jurisdiction for the purpose of interpretation of the Interstate Commerce Act provisions as it relates to unreasonable practice.

Secondly, to remove from the procedural requirement, the court referral, which I believe has been a barrier in some measure, to having cases filed here initially. Thirdly, I believe that if we proceed in appropriate fashion, the courts will accord to us as having done our

primary jurisdictional responsibilities in such a way that the judicial review under ordinary standard would be accorded to our decisions.

I think further that we should continue to handle the cases on a case by case basis, and I feel comfortable that we should perhaps hold in abeyance the MCC-30090 for the purpose of being able, as Commissioner Phillips pointed out, to get a better sense of what now is happening as those cases would be developing before us, and not as cases developed in judicial forums, because they develop in different ways and sometimes non-transportation elements become more critical than the transportation elements, which are our responsibility.

[17] I think it would be advisable, and I would suggest, and attempt to urge my colleagues that we consider holding the NIT League petition in abeyance for the reason that we could bring the information more current in a period of six to nine months, would be a benchmark of time that I would have in mind in which to perhaps make an assessment then of what we've got in terms of the cases that have been filed, and the dispositions of the cases and the issues that have been joined by initial pleadings in proceedings before the Commission.

I think after that period of time, if it's possible, it might very well be that we adopt a policy statement along with a procedural companion provision which would suggest that if you meet the criteria of the policy statement, that an initial pleading demonstrating that might entitle the applicant who files the complaint or the petition to immediate relief, without much further, unless it is contested, on any serious and factual dispute in any way.

Now that's simply my general view as to the NIT League petition, which I think raises a number of critical issues. Based upon the experience that has been going on in judicial forums, I think however it's incumbent upon us in addition to the experience of judicial forums, to develop our own experience before we make an ulti-

mate decision about what a declaratory statement might be. But I do think that down the road, we might very well be able to visit and visit it far more [18] responsibly.

Finally, I think that what is offered in the suggestion of item number 6 is simply working through a procedural mechanism by which if there is a concern that we may be flooded with a large number of cases on the initial filing, that we have a procedure in place in which we can manage the docket and move them promptly and expeditiously.

We have recognized in the past that many of these have been fact-bound cases, and in those instances where it does appear to be fact-bound, it seems to me that there is an easy and efficient way of developing the record. Bundling some cases, which no doubt may come in from what the court records reflect. Frequently, there is a single carrier but a multiplicity of similarly situated claims that are involving a number of shippers, but only one carrier. I think it's quite possible to work out a scheme of docket management and control to handle all of those in a meaningful way.

Plus, giving the people who are able to develop the pattern early on, the opportunity to indicate that the carrier's circumstances may be more repetitive than perhaps fact-bound in subsequent cases. For that reason, I think it's incumbent, and wholly appropriate, that we develop the appropriate mechanism and I think the office of Proceedings and the Office of Hearings and the General Counsel's office are very capable of developing that. [19] I would make one final observation, and that is the Office of Hearings has in cases in which we've had, some difficult times in developing the record. It's performed quite admirably and I think it's terribly important that it not become a forum, if you will, to extend time limits, to otherwise be dilatory or otherwise create a paper record of size and volume beyond the circumstances.

I would point out that in such cases as the Santa Fe Southern Pacific divestiture of the SP, the ALJ's office was terribly important in developing the record on that as well as with the investigation into the Trailer Train question and a number of other cases. I've been quite pleased with respect to the docket management and control that the Chairman has requested under the rate cases.

The Office of Hearings has been more than able to bring those cases to fruition, at least to the point where the parties' negotiations are tracking along with the procedural schedule, in which disposition is ultimately going to be made. In short order, what that does is keep people's feet to the fire and it keeps them focused on the issues and doesn't let the cases wander. I think that's a terribly important ingredient of it. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you, Commissioner Lamboley. Commissioner Andre, do you have any remarks you'd like to open with?

[20] COMMISSIONER ANDRE: Yes, Madam Chairman. In October of 1986, the Commission in Ex Parte No. MC-177 issued a policy statement which established that shippers could assert equitable defenses in undercharge cases, and that if the shipper could also show that the carrier engaged in an unreasonable practice, the ICC would determine that the undercharge claim did not have to be paid.

At that time, it was my hope that the issuance of that policy statement would alleviate the problems that shippers were facing. However, it is becoming increasingly clear that the problem has not been resolved. Over 75 cases, perhaps approaching 100, involving approximately \$10 million have thus far been referred to the ICC and the Commission has favored the shipper in almost every one of these cases.

Unfortunately, many courts have refused to follow our ruling and there are thousands of other cases which have

either been voluntarily settled, tried and lost, or are currently pending. It is estimated that the shipping community is facing up to \$30 million in alleged undercharge bills.

It is my view, a view which I believe the majority supports, that there are two aspects of the Ex Parte No. MC-177 policy which have created this confusion. The first is the requirement of court referral and the second is the language of our decisions which implies that our decisions are merely advisory.

[21] Accordingly, I propose that Ex Parte No. MC-177 should be clarified to incorporate the following three points. Number one, that the Commission will exercise primary jurisdiction under the unreasonable practices provisions of the Interstate Commerce Act. Number two, that the Commission will eliminate the requirement of court referral and number three, that the decisions will no longer be characterized as advisory.

While there are certainly other ancillary issues which need to be resolved, our purpose today should not be to place blame, point fingers or take credit, but rather our purpose should be to sit down, discuss these aspects, reach a consensus, resolve the problem to the best of our ability, and produce a new policy statement reflecting that consensus. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you. Mr. Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Thank you, Madam Chairman. I'd like to join my colleagues in praising Commissioner Phillips and this spirit of collegiality and due diligence that she has brought these issues together before us today.

I've written several memorandums as it relates to MC-177 cases, and in the interest of time I won't expand beyond that in my memorandums that I've submitted to my colleagues and are available to the Commission watchers. In that regard, I am prepared to vote yes on all six issues.

[22] CHAIRMAN GRADISON: Thank you, Vice Chairman Simmons. I've strongly supported the Commission's past effort to rectify the problem of negotiated rates. We'd hoped that earlier steps that we took would resolve this problem. While they were a step in the right direction, we know that the problem persists and that the Commission must move forward with further measures if shippers are ever going to be extricated from this dilemma.

I fully support the proposition that the Commission must clarify its position with regard to its primary jurisdiction over these negotiated rates issues. Because the problem is so great, I'd go a step further than speaking only through 177.

I would also issue a rule which unequivocally sets forth the Commission's standards for determining when a shipper is entitled to a waiver of undercharges due to an unpublished but negotiated motor carrier rate. I'm supportive of any and all administrative measures which we can take to deal with these negotiated rates problems and am open to any suggestions for further action by this Commission. Finally, I continue to believe that the cleanest, most effective way to eliminate the problem is through legislation.

To open the discussion further, with regard to Commissioner Lamboley's statement that we need to build a record of our own experience before we issue a policy [23] statement, I'm of the opinion that with the 75 to the 100 cases we've issued, though they have been referred to us by the courts, this agency has never seen a negotiated rate it didn't like. We might just as well say that in a policy statement, both in of the 177 and the MCC-30090 proceedings, and move forward in that regard.

With regard to the addition of ALJs into the process, we have a one-step process today. We have a fine ALJ and Office of Hearings, and I agree that if the docket

becomes so voluminous that we are overwhelmed, that use of an ALJ might be the solution.

But for the time being, let's not take a one-step process and turn it into a two-step process. It seems to me we're all in agreement on that. I think that the language in the voting sheet it's pretty clear that we will work together with the GC's office. Proceedings and Hearings, to develop a flexible docket management plan. It seems to me that's the sort of unanimous endeavor that we undertake every day in working on managing our docket. I fail to understand why it requires a vote.

Having said that, are there any comments?

VICE CHAIRMAN SIMMONS: Yes, I would like to comment, Madam Chairman. As a member of the Commission, I certainly am not a clone for any 177 case that I didn't like. I like to think that each one of my votes is objective, with careful [24] thought, and not predetermined by any such action. That's the way I will approach these cases, as they're submitted to us on a case by case basis.

CHAIRMAN GRADISON: Commissioner Andre?

COMMISSIONER ANDRE: Yes. I have a question for Ms. Mackall, with regard to handling these cases in the Office of Proceedings. Isn't there a more streamlined way that you could be handling these cases, and thereby forego the necessity of bringing in ALJs?

MS. MACKALL: There certainly are different things we can do. We haven't needed to look to them yet, because the docket is so small that we can handle it very easily with our current staff. If it were to balloon, we would start looking at other things to do. For example, shortening the decisions, batching them for a vote as the Commissioners have already mentioned, things like that.

COMMISSIONER ANDRE: So that would thus streamline the process?

MS. MACKALL: Yes.

COMMISSIONER ANDRE: Furthermore, isn't it true that if we were to bring ALJs into the picture, that they have an automatic delay built into their appellate process?

MS. MACKALL: Well, as the Chairman said, it is two steps. They issue an initial decision and then there's the right of appeal. The right of appeal involves the appeal, the [25] reply and then the Commission's decision on the appeal.

COMMISSIONER ANDRE: So it appears to me, Madam Chairman, that bringing the ALJs into the picture has a downside risk to it as well as the possible positive aspects of it, inasmuch as there's a real potential there for increasing regulatory lag, which I don't think you want to do and I don't think this Commission wants to do.

CHAIRMAN GRADISON: Commissioner Lamboley, did you have a comment?

COMMISSIONER LAMBOLEY: No.

CHAIRMAN GRADISON: Okay. Well, why don't we go ahead and vote? Any further comments before we call the roll? I'm going to suggest, in view of the statements that have been made here today, that we vote on items 1 through 4 at the same time. Those in attendance here have the voting sheet before them.

This covers the issue of whether the Commission should reopen Ex Parte MC-177. If the answer to that is yes, should the Commission clarify Ex Parte 177 to explain that the Commission's options represent the exercise of its primary jurisdiction and thus are binding and only subject to judicial review under the arbitrary and capricious standard.

The third item is if the answer to 1 is yes, should the Commission modify Ex Parte MC-177 to provide that the Commission will accept negotiated rates cases without court [26] referrals, and the fourth item, should the Commission continue to handle negotiated rates cases on a case by case basis.

COMMISSIONER PHILLIPS: Madam Chairman, before you do that, could I ask a procedural question of General Counsel Burk? Specifically, could you let us know whether or not reopening of MC-177 would be appropriate and whether we would require any type of additional comment, notice, or anything.

MR. BURK: It would be appropriate. It would not require additional comment. You are clarifying what you have already stated. It doesn't require any taking of comment from other people to let the public know what it is you meant by 177.

COMMISSIONER PHILLIPS: Thank you.

CHAIRMAN GRADISON: Is the Commission prepared to vote?

VICE CHAIRMAN SIMMONS: Yes.

CHAIRMAN GRADISON: Madam Secretary?

SECRETARY MCGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY MCGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY MCGEE: Commissioner Andre?

COMMISSIONER ANDRE: Yes.

SECRETARY MCGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

[27] SECRETARY MCGEE: Chairman Gradison?

CHAIRMAN GRADISON: Yes.

[Questions 1 to 4 answered in the affirmative, 5 to 0.]

CHAIRMAN GRADISON: Now with regard to item 5, I've made my position clear. Are there any other comments on item 5?

[No response.]

CHAIRMAN GRADISON:—Hearing none, please call the role.

SECRETARY MCGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY MCGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY MCGEE: Commissioner Andre?

COMMISSIONER ANDRE: No.

SECRETARY MCGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

SECRETARY MCGEE: Chairman Gradison?

CHAIRMAN GRADISON: I vote no because I would prefer to go ahead and respond with a rule at this time in addition to handling these cases on a case by case basis.

[Question 5 answered in the affirmative, 3 to 2.]

CHAIRMAN GRADISON: Item number 6, if negotiated rate cases will continued to be handled on a case by case basis, [28] should the Commission direct the Offices of General Counsel, Proceedings and Hearings to develop a flexible docket management plan that will provide for the participation of the Commission's administrative law judges in resolution of negotiated rate cases.

SECRETARY MCGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY MCGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY MCGEE: Commissioner Andre?

COMMISSIONER ANDRE: No.

SECRETARY MCGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

SECRETARY MCGEE: Chairman Gradison?

CHAIRMAN GRADISON: I vote no. I think that we can handle this on a regular case by case basis, and that a vote is not required to include administrative law judges in the processing of cases should we choose to do so at a later date.

[Question 6 answered in the affirmative, 3 to 2.]

CHAIRMAN GRADISON: The Commission has tried yet again to take an action with regard to our negotiated rates problem. A draft decision reflecting today's vote will be prepared and circulated for notation voting. With that—

pricing, while tariff filing and availability have become loosely ordered carrier duties, the Commission's renewed vigil in enforcing reasonableness requirements fills a compelling need. If the law of the marketplace that honors contracts were deprived of its sanctions by the filed rate doctrine, and the Commission's authority to grant relief were denied, nothing would be left to afford a legal remedy. What would remain in the marketplace is anarchy in transportation pricing.

WHEREFORE, SNFCC urges that the Eighth Circuit's decision in favor of the respondent shipper be affirmed.

Respectfully submitted,

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April 2, 1990

APPENDIX

APPENDIX A

LIST OF 122 CARRIERS WHICH HAVE FILED
UNDERCHARGE CLAIMS AGAINST SHIPPERS
BASED ON NEGOTIATED BUT UNFILED RATES

ADAMS EXPRESS
*ADVANCE UNITED EXPRESSWAYS, INC.
ALLSTATE
AMERICAN CARRIERS, INC.
*AMERICAN FREIGHT SYSTEMS, INC.
ANDERSON MOTOR LINES
*ATLANTIS EXPRESS
B. B. & B. TRANSPORTATION
B.D.L. TRUCKING
B. F. WALKER
BRANCH MOTOR EXPRESS COMPANY
BREMEN'S EXPRESS COMPANY
BRIGGS TRANSPORTATION COMPANY
*BRINKE TRANSPORTATION CORPORATION
BRITON MOTOR SERVICE, INC.
*C & H NATIONWIDE
CALIFORNIA MOTOR EXPRESS
*CAMPBELL SIXTY-SIX EXPRESS, INC.
*CANNY TRUCKING COMPANY, INC.
CARAVAN REFRIGERATED CARGO
CAROLINA MOTOR EXPRESS, INC.

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

CATAWBA VALLEY MOTOR LINES
 *CERTIFIED CARRIERS OF AMERICA
 CHIEF FREIGHT LINES
 CLAIRMONT TRANSFER COMPANY
 CLAXTON TRANSPORT
 *COLISEUM CARTAGE COMPANY, INC.
 *COLUMBIA NAVIGATION
 *CROSS E TRANSPORTATION
 CW TRUCKING
 DEPENDABLE CARTAGE AND TRANSPORTATION CO.
 DUDLEY TRUCKING COMPANY
 DUNKLEY TRANSPORTATION COMPANY
 EAGLE EXPRESS COMPANY
 EAZOR SPECIAL SERVICES, INC.
 *EXPRESS FREIGHT LINES
 *EXPRESS TRANSPORTATION COMPANY
 FELDSPAR TRUCKING COMPANY
 *FREIGHTCOR SERVICES, INC.
 G.M.W., INC.
 GARLEPIED TRANSFER
 GATEWAY TRANSPORTATION COMPANY, INC.
 GLENDENNING MOTORWAYS, INC.
 GORDON TRANSPORTS, INC.
 GREENSTREAK SERVICES
 HAGEN, INC.
 *HALLS MOTOR TRANSIT COMPANY
 HALLS SYSTEMS, INC.
 HIGHWAY EXPRESS, INC.

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

I.C.X.
 I.M.L. FREIGHT, INC.
 INTERSTATE MOTOR FREIGHT SYSTEM
 INDIANHEAD TRUCK LINES
 INF, LTD.
 INMAN FREIGHT SYSTEMS
 INTERNATIONAL DISTRIBUTION CENTERS
 *LEE WAY MOTOR FREIGHT, INC.
 *MAISLIN INDUSTRIES, U.S., INC.
 *MANLEY TRUCK LINES, INC.
 *MCLEAN TRUCKING COMPANY
 MERCHANT STOR-DOR FREIGHT SYSTEMS, INC.
 MERCURY FREIGHT LINES, INC.
 MID AMERICAN LINES, INC.
 *MILNE TRUCK LINES, INC.
 MISTLETOE EXPRESS SERVICES
 MOTOR FREIGHT EXPRESS, INC.
 *MURPHY MOTOR FREIGHT LINES, INC.
 NEW ULM FREIGHT LINES
 *NOERR MOTOR FREIGHT, INC.
 OBSERVER TRANSPORTATION COMPANY, INC.
 *ONEIDA MOTOR FREIGHT, INC.
 ONE-WAY CARTAGE SYSTEM
 ORSCHELN BROTHERS TRUCK LINES
 *OVERLAND EXPRESS, INC.
 PENNCO TRUCKING
 PERRY MOTOR FREIGHT, INC.

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

PILOT FREIGHT CARRIERS
 PRE-FAB TRANSIT COMPANY
 *QUINN FREIGHT LINES
 *REBEL MOTOR FREIGHT, INC.
 REGAL TRUCKING COMPANY
 RFI TRANSPORT, INC.
 *RITTER TRANSPORTATION, INC.
 *R.L. TRUCKING COMPANY
 ROBBINS TRUCK LINE, INC.
 ROBINSON TRUCK LINES, INC.
 ROSE FREIGHT LINE
 RTC TRANSPORTATION, INC.
 *SANTA FE TRAIL TRANSPORTATION COMPANY
 SAVAGE BROTHERS
 *SHARM EXPRESS, INC.
 SHIPWESTERN EXPRESS
 SILVER WHEEL FREIGHT LINE, INC.
 *SMITH TRANSFER
 SW FREIGHT LINES
 *SOUTHWEST MOTOR FREIGHT
 *SPECTOR RED BALL
 *SQUAW TRANSIT COMPANY
 *STEVE D. THOMPSON TRUCKING
 *SUBURBAN MOTOR FREIGHT, INC.
 SUTCO TRANSPORTATION
 *SYSTEM 99
 TAYNTON FREIGHT SYSTEMS, INC.
 TITAN TRANSPORTATION, INC.

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

*TOBLER TRANSFER, INC.
 TOTAL TRANSPORTATION TRUCKING, INC.
 TRANSPO INTERNATIONAL, INC.
 *TRANSPORTATION SYSTEM INTERNATIONAL, INC.
 TRI-STATE MOTOR TRANSIT COMPANY
 TUCKER FREIGHT LINES
 *TWIN CITY FREIGHT, INC.
 *UNITED SHIPPING COMPANY
 *UNZICKER TRUCKING
 *USA EASTERN, INC.
 *USA WESTERN, INC.
 *WENHAM TRANSPORTATION, INC.
 *WESCAR FREIGHT SYSTEMS, INC.
 WEST COAST TRUCK LINES, INC.
 WESTERN HARVEST CARRIERS
 WILSON FREIGHT
 L.C. WORLEY TRANSFER, INC.
 YOUNGER TRANSPORTATION

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

APPENDIX B

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

I, EDWARD C. FERNANDEZ, Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of all of page 1; page 2 (except lines 8 through 15); page 3 (line 1 only); all of pages 9 through 12, and page 13 (through line above heading C) of the Petition for Declaratory Order Regarding Tariffs That Contain A Range Of Discounts Or Apply To Customer Code Numbers, in No. MC-C-30117, filed July 13, 1988, the originals of which are now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto
set my hand and affixed the Seal of
said Commission this 29th day of March
A.D., 1990.

/s/ Edward C. Fernandez
ACTING SECRETARY OF THE
INTERSTATE COMMERCE COMMISSION

(SEAL)

BEFORE THE
INTERSTATE COMMERCE COMMISSION
ICC DOCKET NO. MC-C-301179

PETITION FOR DECLARATORY ORDER REGARDING
TARIFFS THAT CONTAIN A RANGE OF DISCOUNTS
OR APPLY TO CUSTOMER CODE NUMBERS

I. SUMMARY OF REQUESTED RELIEF

The Regular Common Carrier Conference (RCCC) respectfully petitions the Interstate Commerce Commission (ICC or Commission) for a declaratory order finding it unlawful for a motor common carrier of property (except household goods)¹ to publish and conduct business pursuant to a tariff that has a range of discounts that can apply to a given shipment. These types of tariffs—whether referred to as range tariffs, trigger tariffs, or write-in tariffs—have attributes in common; they contain no formula or methodology for determining which of a series of rates will apply when a given type and quantity of freight is tendered for shipment. In reality, they are an offer to negotiate a rate rather than a filed rate since no set standard for applying a rate is given. They are vague and indefinite. Consequently, they should be found to violate

¹ This exception of motor common carriers of household goods is requested for two reasons. First, the ICC has already initiated a declaratory order addressing these tariff issues as they pertain to the household industry. See, *Andrews Van Lines, inc. et al. - Petition for Declaratory Order*, ICC Notice served July 14, 1987. Second, the binding estimate provision, 49 U.S.C. §10735, which applies solely to household goods carriers, may be pertinent to the legal issues presented in the *Andrews Van Lines* proceeding, but has no relevance to the issues here.

the basic statutory tariff requirements. 49 U.S.C. §§10761 and 10762. Obviously, the ICC's remedial action should be prospective because the tariff rate is the legal rate until the ICC finds otherwise. Carriers have operated under the belief that they are lawful. ***

The RCCC further requests that the ICC, upon finding these tariffs to be unlawful, order all motor common carriers of property (except household goods) to cancel such tariffs. In an effort to assist the Commission, the RCCC has attached in Appendices A & B a list of tariffs filed with the ICC during the week of May 23-27 and which would be subject to the proposed declaratory order. These tariffs were identified in an independent sampling performed for the RCCC by Don H. Norman and Associates of Vienna, Virginia. During that one week period, 34,341 individual tariff pages and 5,446 pages of agency tariffs were reviewed. Eighty-two motor carriers were identified as filing the trigger or code tariffs in question here. ***

B. The Relevant Case Precedent

Over the past three years, the Commission and courts have rendered a number of important decisions regarding the permissibility of certain tariff practices.

In May, 1985 the Commission denied a special tariff authority request of ANR Freight system, Inc. (ANR) because it was indefinite.⁵ ANR proposed a tariff providing discounts ranging from 13 to 38 percent off the class rates. The exact percentage discount to be applied would be an "amount mutually agreed upon by the shipper and carrier(s), taking into consideration the reasonable value and characteristics of the property to be transported under the circumstances surrounding the handling and transportation." The ICC correctly concluded that this tariff was too

⁵ Special Tariff Authority No. 84-500, *Negotiated Discounts*, ANR Freight System, Inc., unprinted decision, served May 22, 1985.

indefinite. There is no way for the tariff user to determine which of the 25 discount levels would apply. The proposed "reasonable value and characteristics of the property" standard is too vague and subjective. It does not provide a definite formula by which the discount rate can be determined.

Subsequently, in June, 1985 the Commission also denied, as indefinite, a special permission application of American Freight System, Inc. (AFSI).⁶ The ICC summarized the tariff proposal as follows:

The tariff provisions which AFSI wishes to file would set out a graduated series of 99 rates ranging from 50 cents through 375 cents per loaded vehicle mile. These rates would apply on general commodities throughout the petitioner's operating territory when the petitioner has been offered, or has located, a volume or truckload shipment which would provide a revenue movement in place of an empty return of equipment. The tariff contains no formula or any other method that can be used to determine which of the 99 possible rates would be used on any given shipment. The rate to be applied is open to negotiation based on what the traffic will bear and the degree of AFSI's immediate traffic imbalance. Decision at page 1.

Because this tariff lacked a formula to determine which rate would apply, the Commission properly concluded that "the indefinite nature of the tariff proposal does not meet the minimum technical requirements of the statutes." More specifically, it failed to comport with the requirements of Sections 10761 and 10762(a)(2). It is important to note that the AFSI tariff was a write-in tariff with a range of discounts. It required AFSI to confirm in writing to the

⁶ Special Tariff Authority No. 85-1852, *Excess Capacity Rates*, American Freight System, inc., unprinted decision, served June 17, 1985.

consignor the terms of any acceptance under the discount program. In other words, the shipment may have already been moved, yet the rate not finally determined. This clearly would violate the requirement of Section 10761(a).

In October, 1985 the Commission denied a similar application of Haddad Transportation Company.⁷ Haddad sought to publish a special tariff extending discounts between one and ten percent off the applicable rates to shippers. The discounts were to be based on the "value of traffic" to Haddad and the "value of service" to the shipper. To conceal the level of discount given to a particular shipper, the shippers were given a secret account number.

The RCCC protested this request arguing that it failed to comply with tariff requirements in Sections 10761 and 10762. The Commission concurred. It concluded that Haddad's proposal failed to meet even the minimal statutory prerequisite that there be a method of calculating the rate.

Probably the most important, recent court case on the tariff filing requirements is *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986). In that case, the D.C. Circuit Court reversed this Commission's decision approving a so-called "average rate tariff rule" proposed by the Freight forwarders Tariff Bureau. The tariff provided that a forwarder could agree with shippers on a rate to be determined by averaging prior charges for similar shipments. The tariff did not provide a coherent method for averaging of the past shipments. Moreover, the averaged rate was never published in a tariff with the ICC. The D.C. Circuit Court held that the tariff provision violated Section 10761 providing for a rate contained in a tariff. Judge Scalia, writing for the Court, held that tariffs are acceptable under the current law only if they permit competitors to know how a per-unit rate is deter-

⁷ Special Tariff Authority No. 85-2375, *Haddad Transportation*, unprinted decision, served October 31, 1985.

mined and provide shippers with the methodology to compute the precise per unit rate to which they are entitled. 793 *supra*. at 380.

Importantly, the Court contrasted this type of tariff with volume discount tariffs. The Court noted that the latter contain a per unit measure which enables competing carriers and shippers to determine what rate would be charged when a specific volume of freight is tendered.

With a range tariff, it is impossible for either a shipper or competitor to determine which rate will apply. As in the RCCC case, the tariff constitutes nothing more than an offer to negotiate with shippers as to which rate will be given. Consequently, it fails to satisfy the statutory requirements.

Subsequently, the ICC invalidated three separate tariffs published by Pilot Freight Carriers, Inc., Consolidated Freightways, Corp., and Bowman Transportation, Inc. which Roadway Express challenged.⁸ Although slightly different, the Commission summarized the general attributes in these three tariffs as follows:

"(1) [they] require that shippers request participation in the program; (2) set forth a range of rates that will apply if certain traffic imbalances exist; (3) provide for the shipper to be assigned a participation number (not contained in the tariff); and (4) require carrier approval of a shipper's participation in the program. . . ." (Decision at page 4).

Once again, the Commission concluded that these write-in tariffs with a range of discounts violated the requirements of sections 10761 and 10762. The Commission reasoned as follows:

⁸ See, Docket No. MC-C-10971, *Roadway Express, inc. v. Pilot Freight Carriers, Inc., et al.*, unprinted decision, served December 6, 1986; See also, Docket no. MC-C-10975, *Roadway Express, Inc. v. Consolidated Freightways*, unprinted decision, served July 14, 1987.

"The tariffs challenged in the instant cases contain no formulas for determining when a particular rate will apply or how it will be computed. This appears to be a matter for the carrier and shipper to discuss based on an evaluation of traffic imbalances at the time of shipment. Thus, the rates charged by each carrier will vary according to the imbalances of traffic each carrier has in a particular traffic lane at the time when a shipper tenders a shipment to the carrier and will be determined by factors that cannot be discerned from the tariff. Hence, potential shippers will not be able to compute the precise per-unit rates to which they are entitled based solely on the tariff, although, they will be able to calculate rates once the carrier has informed them of the per mile charge. Competing carriers will not be able to know the rate or how a per-unit rate is determined based on the tariff. Accordingly, these tariffs do not meet the minimal requirement that tariffs set forth either the actual rate or the method for calculating charges, as required by *Haddad, supra*, and *Regular Common Carrier Conference, supra*." (Decision at pages 5-6).

In summary, the controlling case precedent amply demonstrates that these tariffs with a range of discounts are unlawful.***

APPENDIX C

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

I, EDWARD C. FERNANDEZ, Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of that certain letter dated March 12, 1987 from T.K. Ledman to Thomas M. Auchincloss, Jr., Esq., which was an attachment to a letter-petition for a filing deadline extension submitted to the Commission under the same date by respondents in No. MC-C-30013, *A.J. Hollander Company et al.—Petition For Declaratory Order*, and No. MC-C-10961, *Primary Steel, Inc. v. Maislin Industries, U.S., Inc.*, the original of which is now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto
set my hand and affixed the Seal of
said Commission this 29th day of
March, A.D., 1990.

/s/ Edward C. Fernandez
ACTING SECRETARY OF THE
INTERSTATE COMMERCE COMMISSION

(SEAL)

[LETTERHEAD OF DON H. NORMAN ASSOCIATES, INC.]

March 12, 1987

Thomas M. Auchincloss, Jr., Esq.
Rea, Cross & Auchincloss
Suite 700
One Thomas Circle, N.W.
Washington, D.C. 20005-5907

Dear Mr. Auchincloss:

Reference is made to your numerous requests for rate research involving the tariffs of various motor carriers that were in effect during the period 1981 through 1983. As reported, we have been unable to complete our assignments for three principal reasons, viz.:

1. The condition of the ICC Official File.
2. Current access to the ICC Official File.
3. Required tariffs not on file at the ICC presumed to be at the Federal Record Center (Suitland, Maryland).

Several years ago the Commission eliminated its public tariff file. Since that time, the public has been required to utilize the same file as do ICC staff personnel. Subsequent to that, and due to staffing and budget restraints, the Official File is no longer maintained in a quality fashion. New pages are simply placed at the rear of the tariff within a binder, rather than substituted for the cancelled material.

Access to the official File of the Commission was extremely limited during the week of March 9, 1987, due to the recarpeting of that facility. Our tariff analysts have literally crawled over desks and boxes in order to attempt to secure particular tariffs.

Lastly, many tariff publications are simply missing from the Commission's file. We first attempt to secure tariffs from that file, checking both the current and cancelled portions thereof. If we do not locate a tariff in the current file, the assumption is that it has been cancelled and transferred to the Federal Record Center in Suitland, Maryland. The Commission's file personnel have issued requests to the Federal Record Center on our behalf for tariff publications to be brought to the Interstate Commerce Commission for our review.

While we are advised that this process takes somewhere between seven and ten days, we have found that the time required is greater because materials were furnished in error and others were simply indicated to be missing. This requires us to refile our requests and, of course, doubles the amount of time necessary to secure cancelled tariffs. We still have requests pending at the Federal Record Center and it must be assumed that, as our research progresses, we will continue to encounter these difficulties.

Very truly yours,

T. K. LEDMAN
Executive Vice President

TKL/ba

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA
JAMES H. HARRIS, JR., et al.,
Petitioners,
vs.
UNITED STATES, et al.,
Respondents.

COMES NOW the Petitioners and
files with the Court the following
Petition for Habeas Corpus and
Writ of Certiorari, and prays that
the Court will grant the same.
Dated this 1st day of June, 1964.
JAMES H. HARRIS, JR., et al.,
Petitioners.
BY: JAMES H. HARRIS, JR., et al.,
Attorneys.

WILLIAM H. BOHRERMAN, JR.,
Counsel of Record
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MORRIS W. BUCKLEY
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H.R. Rep. No. 253, 89th Cong. 1st Sess., pp. 12, 13 (1965)	21-22,26
Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793	23
Pub. L. No. 89-170, 79 Stat. 651-652	20

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-624

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,
v.
PRIMARY STEEL, INC.,
Respondent.

**On Writ of Certiorari to
the United States Court of Appeals for the
Eighth Circuit**

**BRIEF AMICI CURIAE OF THE
NATIONAL-AMERICAN WHOLESALE GROCERS'
ASSOCIATION, THE RUBBER MANUFACTURERS
ASSOCIATION, ANHEUSER-BUSCH COMPANIES, INC.,
BAXTER HEALTHCARE CORPORATION,
MOTOROLA INC., AND RINGLING BROS. AND
BARNUM & BAILEY COMBINED SHOWS, INC.
IN SUPPORT OF RESPONDENT**

This brief is respectfully submitted on behalf of the National-American Wholesale Grocers' Association ("NAWGA"), the Rubber Manufacturers Association ("RMA"), Anheuser-Busch Companies, Inc., Baxter Healthcare Corporation, Motorola Inc., and Ringling Bros. and Barnum & Bailey Combined Shows, Inc., as *amici curiae*. Pursuant to Rule 37.3 of the Rules

of this Court, *amici* have obtained and filed the written consent of each of the parties to the filing of this brief. The *amici* support the position of respondent in this case and urge affirmance of the decision below.

INTEREST OF AMICI CURIAE

NAWGA is a national trade association comprised of food distribution companies which primarily supply and service independent grocers and foodservice operations throughout the United States and Canada. NAWGA's 350 members operate over 1,300 distribution centers nationwide with a combined annual sales volume in excess of \$85 billion. RMA is a national trade association representing approximately 200 rubber and tire manufacturers. RMA members produce an estimated 40,000 different rubber products, and account for 90 percent of all rubber production in the United States.

Anheuser-Busch Companies, Inc. is a holding company whose subsidiaries include Anheuser Busch, Inc., a brewer, and other companies engaged in such diverse activities as real estate, major league baseball, and container manufacturing. Baxter Healthcare Corporation develops, manufactures, and distributes health care products, systems, and related services for use principally by hospitals, blood and dialysis centers, laboratories, nursing homes, and physicians. Motorola Inc. produces electronic equipment, systems, and components, including two-way radios, pagers, cellular telephone systems, defense and aerospace electronics systems, and data communications and information systems. Ringling Brothers and Barnum & Bailey Combined Shows, Inc. produces and presents

live entertainment, including ice shows and circuses, throughout the world.

The diversity and scope of their operations require that *amici*—including the NAWGA and RMA members—ship a wide variety of products throughout the nation. These shipments consist of finished manufactured goods, as well as raw materials, supplies, and equipment inbound to *amici*'s production and manufacturing locations. Because *amici*'s production sites are, for the most part, not served by railroads, and since rail transit times are generally not suited to their operations in any event, the preponderance of *amici*'s traffic is transported by for-hire motor carriers regulated by the Interstate Commerce Commission ("ICC" or "Commission").

In recent years, many motor carriers, in an attempt to either obtain or retain *amici*'s traffic, have quoted rates for the transportation of that traffic at levels below those published in the carriers' tariffs on file with the ICC; the understanding was that the rates the carriers quoted and negotiated would be published by the carriers before they transported any freight thereunder. However, the rates frequently were not published, even though the carriers transported *amici*'s traffic over a continuing period of time, billed *amici* at the quoted rates, and accepted payment from *amici* at those rates. Because of the carriers' failure to publish the negotiated rates in their tariffs, *amici* have been subjected to numerous lawsuits seeking recovery of freight undercharges equal to the difference between the negotiated rates that had been quoted by the carriers and paid by *amici*, but not filed, and the carriers' higher filed rates. *Amici* have responded to these suits, which have been brought for the most

part by the carriers' representatives in bankruptcy, by asserting that collection of the filed rates would, under all the circumstances, be an unreasonable carrier practice in violation of the Interstate Commerce Act ("Act").

The issue presented in this case is whether a motor carrier has the right to collect the rates in its filed tariffs when to do so would violate the Act; that issue is the same one raised in the undercharge suits filed against *amici*. In addition, as substantial users of motor carrier service, the issues presented herein are of great importance to *amici* generally. They have, therefore, a compelling interest in the Court's resolution of this proceeding.

SUMMARY OF ARGUMENT

Both the district court and a unanimous panel of the court of appeals concluded in this proceeding that the ICC has exclusive authority to decide if the collection of a motor carrier's filed rate should be barred when such collection would, under all the circumstances, violate the Act. These decisions fully comport with this Court's precedent, as well as with the Act and decisions of the lower federal courts.

The filed rate doctrine, which requires carriers to charge only those rates contained in filed tariffs, does not override the ICC's power to prevent the collection of a filed rate. This Court has held that filed rates must be reasonable. If the ICC concludes that they are not, the filed rates may not be imposed. Because a carrier's rates and the practices relating thereto must be reasonable, it is equally apparent that, in an

action by a carrier to collect its filed rates, a shipper may assert a defense that such collection would violate the Act.

The ICC's power to prohibit the collection of filed rates, when such collection would violate the Act, is exclusive and plenary. The Act and this Court's decisions confer upon the Commission the sole responsibility to decide whether motor carrier rates and practices are reasonable, and the right to fashion appropriate remedies for any rates and practices it finds are not. In view of the ICC's exclusive regulatory authority over motor carriers, the court below properly found that the doctrine of primary jurisdiction required referral to that agency of the issues here involved.

ARGUMENT

The ICC Has Exclusive And Plenary Authority To Find That A Motor Carrier Subject To Its Jurisdiction May Not Collect Its Filed Rates When Such Collection Would Be Unreasonable And Thereby Violate The Act

A. The Filed Rate Doctrine Is Not Absolute And Does Not Bar An ICC Finding That A Filed Rate Or Its Collection Is Unreasonable

The court below held, *inter alia*, that the filed rate doctrine found in Section 10761(a) of the Act, 49 U.S.C. § 10761(a)¹, did not prevent the ICC from finding that petitioner Quinn Freight Lines, Inc. ("Quinn") could not collect its published tariff rates from respondent Primary Steel, Inc. ("Primary"). *Maislin Industries and U.S. Inc. v. Primary Steel, Inc.*, 879

¹ Under Section 10761(a), a motor carrier's rates must be contained in a tariff on file with the ICC, and the carrier can only charge those rates.

F.2d 400, 404-406 (8th Cir. 1989) (Pet. App. 1a).² The court noted that Section 10761(a) is only one part of the statute. It is not to be elevated over Section 10701(a), 49 U.S.C. § 10701(a), which requires that motor carrier rates and practices be reasonable; any conflict between these sections is to be reconciled by the ICC. *Id.* at 405.

In urging reversal of this decision, petitioners claim³ that since the filed rate doctrine requires carriers to collect only their filed rates, the ICC may never permit a shipper to assert a defense to such collection. (Brief For The Petitioners, 10) ("Pet. Br."). According to petitioners, "the Act is intentional in design in prohibiting exceptions to the filed rate doctrine". (*Id.* at 12).

These arguments seriously misapprehend the statutory provisions applicable to motor carrier rates and practices. It is evident from those provisions that the doctrine requiring collection of a carrier's tariff rates does not apply when the rates, or their collection, violate other provisions of the Act. While Section 10761(a) compels a motor carrier to provide transportation pursuant to rates contained in tariffs filed with the Commission and to charge and collect only those rates, Section 10701(a) of the same statute requires that those rates and the carrier's practices be reasonable. Additionally, Section 10704(b)(1), 49

² "Pet.App." refers to the Appendices to the Petition for Writ of Certiorari filed in this proceeding.

³ The amici supporting petitioners advance essentially the same arguments as petitioners in requesting that the decision of the court below be set aside. Their arguments, therefore, will not be addressed separately.

U.S.C. § 10704(b)(1), provides for the prescription of remedies by the ICC if it decides that a motor carrier's rates or practices are not reasonable, and Section 11705(b)(3), 49 U.S.C. § 11705(b)(3), subjects motor carriers to damages resulting from the imposition of rates the ICC finds to violate the Act.

These provisions manifestly deny a motor carrier the right to collect its filed rates when the ICC concludes that to do so would be unreasonable or otherwise unlawful. However, under petitioners' construction of the Act, the filed rate doctrine repeals the "reasonableness" sections and, in so doing, relieves carriers from any obligations thereunder. Such an interpretation is patently impermissible, without support, and contrary to basic tenets of statutory construction. To give full effect to all of the relevant and co-equal portions of the Act—as did the court below—Section 10761(a) must be viewed as only one part of a statute which, while requiring carriers to charge their filed rates, at the same time mandates that such rates, and the practices related thereto, be reasonable.⁴ As the ICC explained in its decision in

⁴ It is a cardinal principle of statutory construction that courts must attempt to give an act's provisions a harmonious and comprehensive meaning. See, e.g., *Richards v. United States*, 369 U.S. 1 (1962); *Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1857); *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987); *Beisler v. CIR*, 814 F.2d 1304 (9th Cir. 1987); *Consortium of Com. Based Organizations v. Donovan*, 530 F.Supp. 520, 528 (E.D. Cal. 1982) (citing *Stafford v. Briggs*, 444 U.S. 527, 535 (1980)). ("It is fundamental that a court is not to read each section of a statute in isolation but, rather, should consider each section in connection with the entire statute and the objects and policies of the law as indicated by the various provisions.")

Petition to Institute Rulemaking On Negotiated Motor Common Carrier Rates, 5 I.C.C. 2d 623, 627 (1989), "Section 10761 is only part of an overall regulatory scheme; it should not be elevated over the unreasonable practices provision of § 10701." See also, *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016, 1027 (9th Cir. 1990), *petition for reh'g filed* ("West Coast"); *Seaboard System R.R. Co., Inc. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986) ("Seaboard").

This Court's decisions have confirmed that the plain language of the statute requires that all of the sections thereof relating to motor carrier rates and practices be given equal weight. When such equal weight is accorded, the result is a statutory scheme which creates a distinction between "legal" motor carrier rates and "lawful" rates. The "legal" rate is the rate properly published and filed with the ICC in a tariff as required by Section 10761(a); it must be charged to all shippers alike unless found to be unreasonable. A "lawful" rate is a filed rate which is reasonable or otherwise lawful as required by Section 10701(a). A legal rate, i.e., the filed rate, may at the same time be unlawful if it is declared unreasonable by the ICC. *Arizona Grocery Co. v. Atchison T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) ("Arizona Grocery"). The Court there explained that "the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable". 284 U.S. at 384. See also *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U.S. 263, 277-278 (1892); *United States v. Illinois Cent. R. Co.*, 263 U.S. 515, 521, 525-526 (1924).

Even in *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94 (1915) ("Maxwell"), upon which petitioners primarily rely in claiming that defenses by shippers to collection of the filed rate are prohibited (Pet. Br. 10), the Court held that the filed rate doctrine is not inviolate and that such rate is not necessarily the "lawful" reasonable rate. Instead, a carrier must abide by it, "unless it is found by the Commission to be unreasonable." 237 U.S. at 97. If, as *Maxwell* and *Arizona Grocery* hold, a filed rate must be reasonable in order to be lawful, a shipper obviously may assert a defense, based upon the reasonableness standards of Section 10701(a), to an attempted collection of that rate.⁵ The very authority relied upon by petitioners, therefore, contains the exception to the doctrine they invoke.

That filed rates may properly be subject to remedial action by the ICC was recently reaffirmed by the Court in *I.C.C. v. American Trucking Associations, Inc.*, 467 U.S. 354 (1984) ("I.C.C."). In that case, the Court upheld a Commission policy pursuant to which it nullified effective motor carrier tariffs on file with it if those tariffs were submitted in substantial violation of motor carrier rate bureau agreements. *Id.* at 370-371. The rates contained in those tariffs were, beyond question, filed with the ICC. Nevertheless, this Court held that, under certain conditions, they may be invalidated by that agency.

Many other courts have agreed with the court below, and have held that a shipper may assert an un-

⁵ Petitioners frequently refer to the defense asserted by Primary in this case as an "equitable" one. (See, e.g., Pet. Br. 10). On the contrary, the defense is expressly authorized by Section 10701(a) and the other provisions of the Act discussed herein.

reasonableness defense to the attempted collection of a filed rate. Those courts have confirmed that the raising of such defense under Section 10701(a) is not precluded by the filed rate doctrine. See, e.g., *Carriers Traffic Service, Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475, 481-482 (7th Cir. 1989) ("*Carriers Traffic Service*"); *Delta Traffic Service, Inc. v. Appco Paper & Plastics Corporation*, 893 F.2d 472, 475 (2nd Cir. 1990) ("*Delta Traffic Service*") (referral to the ICC of defense of unreasonableness of carrier's practices does not undermine the filed rate doctrine); *Seaboard*, *supra*, 794 F.2d at 637-638; *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 238 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971) ("[M]erely because the carrier is bound to charge the filed rate, it does not follow that he is entitled to keep it"); *Western Electric Co., Inc. v. Burlington Truck Lines, Inc.*, 501 F.2d 928 (8th Cir. 1974); *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227, 1231 (7th Cir. 1982) ("*Western*") (the ICC has primary jurisdiction to determine whether a "legal" rate is in fact the "lawful" rate); *West Coast*, *supra*, 893 F.2d at 1027 ("Because the ICC's policy harmonizes the filed rate doctrine with the statutory proscription of unreasonable practices, we hold that the ICC's consideration of unreasonable practices defenses to undercharge actions is consistent with congressional intent.") The fact that a motor carrier rate is published in a tariff on file with the Commission as required by Section 10761(a) does not, therefore, forever establish its lawfulness. Instead, the rate itself or the practices surrounding its collection may be challenged as unrea-

sonable under other sections of the Act of equal stature.⁶

Petitioners' authority fails to support their position that filed rates may never be invalidated. The decision in *Square D Company v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), like *Maxwell*, *supra*, does not hold that filed rates must be collected under all circumstances. Instead, the Court held that shippers had no remedy under the antitrust laws for treble damages based upon such rates. The decision does not say that the same shippers may not assert an unreasonableness defense to the attempted collection of a motor carrier's filed rate, nor does it hold that such rate could not be found by the ICC to violate Section 10701(a). On the contrary, the decision expressly acknowledges that filed rates, while not vulnerable to a private antitrust challenge, may nevertheless be declared invalid by the Commission. The Court thus held, quoting from *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922) ("*Keogh*"), that the tariff rate is the legal rate "[u]nless and until suspended or set aside [by the ICC]. . . ." 476 U.S. at 416. The Court added, again quoting from *Keogh*, "[w]hat rates are legal is determined by the Act to Regulate Commerce"'. *Id.* at 416, n. 18. In

⁶ *Maxwell* and *Arizona Grocery*, *supra*, involved the reasonableness of a carrier's rates rather than its practices. However, neither case held that collection of a filed rate could not be resisted on the ground that such collection would be unreasonable. In any event, as seen from the authority discussed at page 10, *supra*, there is no basis for concluding that an ICC finding of unreasonableness as to one element of Section 10701(a) precludes collection of the filed rate, but that a finding as to the other element does not, when the same reasonableness standard of the same provision of the Act applies to both.

short, *Square D*, *Keogh*, *Maxwell*, and *Arizona Grocery* all acknowledge that filed rates can be held to be unreasonable, and thereby recognize that Sections 10701(a) and 10761(a) are co-equal provisions of the Act.⁷

The claim that the rates here involved were not found to be unreasonable and, thus, are "the duly submitted lawful rates", (Pet. Br. 11), again fails to appreciate the interrelationship between the filed rate doctrine and the concurrent statutory requirement that rates and practices be reasonable. The ICC found that the imposition of Quinn's filed rates would, under all the circumstances, be an unreasonable practice in violation of the Act. Because of its commission of a statutory violation, the ICC concluded that Quinn should not be permitted to collect its undercharges based on the filed rate. Since Section 10701(a) provides that the rates and practices of motor carriers must be reasonable, an ICC determination that collection of a filed rate is unreasonable, in response to a shipper's defense thereto, precludes such collection—under the statute and the judicial precedent discussed herein.⁸

⁷ In addition, none of the cases cited by petitioners at pages 10-11 of their brief involved the issue of a shipper's defense to an undercharge claim, nor do those cases remotely support petitioners' position that the ICC lacks authority to prohibit the collection of filed rates.

⁸ Application of the ICC's Section 10701(a) authority to bar the collection of unreasonable undercharges has not resulted in a discarding of the filed rate requirement (Pet. Br. 11-12)—carriers must still publish their rates in tariffs, file them with the ICC, and charge the rates contained therein. Because the filed rate requirement still exists, no statutory requirements have been rendered "unreasonable and unnecessary". (*Id.*)

The decision below gives effect to all of the Act's relevant provisions and concludes therefrom that a carrier's "legal" filed rate may not be collected if such collection would violate the Act. This action resolves, in a rational manner, the tension that exists between the filed rate section of the statute, on the one hand, and, on the other, those parts of the Act mandating that rates and practices be reasonable. This is not judicial or regulatory action of a particularly radical or sinister nature. It is supported by unambiguous statutory language and judicial precedent, and is grounded upon the most basic elements of fair dealing; if a carrier's charges or business conduct relating thereto are unlawful, it should not be allowed to profit by retaining those charges.

Petitioners, on the other hand, are attempting, without any justification whatsoever, to employ Section 10761(a) in a manner that Congress never intended. As the court below explains, 879 F.2d at 404, the filed rate requirement was enacted to protect shippers from rate discrimination; strict adherence to public tariffs by carriers would ensure that a shipper was charged the same rate by its carriers as other shippers. In this case, however, petitioners are requesting that this Court permit the filed rate doctrine to be used, not as a shield to protect the shipping public, but as a bludgeon to force them to pay rates the ICC has found may not be lawfully collected. This perversion of the filed rate requirement is permitted neither by the statute, by the decisions of this Court, nor by any notions of fairness or justice.

B. The ICC Has Exclusive Power To Decide Whether A Motor Carrier's Unreasonable Practices Prevent The Collection Of Its Filed Rates

Not only may a motor carrier be precluded from collecting its filed rate under certain circumstances, but the authority to make the determination as to whether such rate or its attempted assessment is unreasonable, is vested exclusively in the ICC. Petitioners allege, on the contrary, that the ICC had no authority to decide Primary's unreasonableness defense; accordingly, referral of that defense to the agency circumvented the filed rate doctrine. (Pet. Br. 12). This argument again misconstrues the ICC's plenary and exclusive statutory authority over motor carrier rates and practices, and the function it performs in deciding whether such rates and practices are reasonable.

Petitioners attach some significance to the fact that the Act assigns different roles to the Commission depending upon whether a rail or motor carrier proceeding is involved; from this, they claim that it has no jurisdiction to bar the collection of filed motor carrier rates. (Pet. Br. 17-18). This is incorrect; the differences in the ICC's handling of motor and rail cases are procedural only. For example, if a rail rate is at issue, a shipper may file a complaint directly with the Commission. The ICC is empowered to enter an award of reparations on the basis of the complaint; no concurrent pending court action is necessary. 49 U.S.C. §§ 11705(b)(2) and 11706(c)(1).

In a case involving motor carrier rates and practices, however, the claim is filed in a federal district court, not before the ICC. 49 U.S.C. §§ 11705(b)(3) and 11706(c)(2). But the court can only enter an order

after the issue has been referred to the Commission, pursuant to the doctrine of primary jurisdiction,⁹ and that agency has decided the lawfulness of the challenged rate or practice under Section 10701(a). The authority of the ICC, and not a court, to decide such issues is conferred on it by Sections 10701(a) and 10704(b)(1), which give it exclusive jurisdiction to decide reasonableness issues, and by Section 11705(b)(3) which provides that motor carriers are liable for damages resulting "from the imposition of rates . . . the Commission finds to be in violation" of the Act. This means that a motor carrier is liable for the imposition of filed rates which violate the Act only if the ICC, and not a court, so concludes.

Accordingly, the ICC plays the exclusive role in deciding the reasonableness of a motor carrier's filed rates and practices relating to past shipments when such reasonableness is raised by a shipper in a court action. That its decisions may only be implemented by a court does not diminish in any respect the ICC's plenary and exclusive statutory authority to decide such issues.¹⁰ An ICC finding of unreasonableness is binding on the carrier unless such determination is set aside by the referring court. *Interstate Commerce*

⁹ See, e.g., *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956) ("Western Pacific"); *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) ("Great Northern"); *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962) ("Hewitt-Robins"); *Seaboard, supra*, 794 F.2d at 638; *Western, supra*, 682 F.2d at 1231.

¹⁰ An agency need not have power to provide the ultimate relief sought in the court action in order to decide issues entrusted to it by the statute. *Hewitt-Robins, supra*, 371 U.S. at 89.

Commission v. Atlantic Coast Line R.R., 383 U.S. 576 (1966); *Pennsylvania Railroad Co. v. United States*, 363 U.S. 202, 205 (1960); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 536 (1946); *McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944); *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286 (1934); *I.C.C. v. Union Pacific R.R. Co.*, 222 U.S. 541, 547 (1912); *Locust Carriage Co. v. Transamerican Freight Lines, Inc.*, 430 F.2d 334, 341 (1st Cir. 1970).

As the Commission stated in *Informal Procedure For Determining Motor Carrier and Freight Forwarder Reparation*, 335 I.C.C. 403, 413 (1969) "Congress . . . establish[ed] a judicial reference procedure for recovery of reparations by shippers by specifically providing that before a court can award reparations the Commission must determine the extent that the rate or rates in issue 'have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.' " See also *United States v. Associated Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974) ("*Associated Transport*"); *National Motor Freight Traffic Ass'n. v. United States*, 268 F.Supp. 90, 92 (D.D.C. 1967), *aff'd. per curiam*, 393 U.S. 18 (1968) ("*National Motor Freight*").

Numerous courts have confirmed the ICC's exclusive statutory authority to prohibit the collection of a motor carrier's filed rates because of the carrier's past unreasonable practices. See, e.g., *Delta Traffic Service, supra*, 893 F.2d at 474; *Seaboard, supra*, 794 F.2d at 638; *West Coast, supra*, 893 F.2d at 1027; *Carriers Traffic Service, supra*, 881 F.2d at 481, 485 ("for a number of years, the ICC has exercised its 'unreasonable practice' jurisdiction to declare appli-

cation of filed rates unreasonable") ("we . . . uphold the ICC's exercise of its 'unreasonable practice' jurisdiction to invalidate the retroactive application of a higher tariff rate"). Other courts have recognized the discretion of the ICC, in regulating the motor carrier industry, to declare practices unreasonable under other sections of the Act, such as Section 11701(a), which provides that if the ICC finds that a carrier is violating the Act, it "shall take appropriate actions to compel compliance" therewith. See e.g., *Western, supra*, 682 F.2d at 1231, 1232 (Only ICC has statutory authority to decide unreasonableness defense to motor carrier undercharge claim).

Even apart from the statute and the decisions thereunder establishing the ICC's authority to bar the collection of filed rates on the basis of a motor carrier's past practices, this Court has held that the Commission has the exclusive and independent power to decide if a motor carrier's past rate-related practices are unreasonable. In *Hewitt-Robins, supra*, the Court decided that a shipper's claim for damages for unreasonable routing practices by a motor carrier was within the ICC's primary jurisdiction. 371 U.S. at 87. The shipper's challenge was directed not at the reasonableness of the carrier's rates, but at its misrouting practices. *Id.* The Court found that "[t]he practice of the Commission in making such determination [as to motor carrier practices] in the first instance, even though it has no power to award reparations in a given case, has long been exercised . . ." 371 U.S. at 89. (Emphasis supplied).

It is therefore clear that not only does the Commission possess exclusive authority under the Act to award "reparations" for past unreasonable motor car-

rier practices, but even in the absence of such statutory power, it may do so under *Hewitt-Robins*.¹¹ See also *Northern Pacific Ry. v. Solum*, 247 U.S. 477, 483 (1918) ("the rule which requires . . . preliminary determination of administrative questions by the Commission applies . . . to any practice of the carrier which gives rise to the application of a rate"); *Great Northern*, *supra*, 259 U.S. at 291.

Petitioners argue, however, that the decision of the court below that the filed rates could not be collected created a remedy for the shipper "where none independently exists in either the courts or the ICC." (Pet. Br. 13, 16). If by "independent" authority petitioners mean "sole" authority, they are correct only to the extent that complaints involving motor carrier rates and practices must, as discussed, be filed initially with a court; but the decision on the merits as to the lawfulness of the rates and practices is rendered by the ICC. Pursuant to Sections 10701(a) and 11705(b)(3), the ICC—and not a court—can waive the collection of past rates, with such order then enforced by the courts. That the remedy may not be granted by the ICC "independently" is irrelevant. Such independence is not required by the Act; instead, a joint procedure is specifically prescribed.¹²

¹¹ *Hewitt-Robins*, therefore, provides no assistance to petitioners. (Pet. Br. 18-19). Even assuming the ICC has no statutory authority to decide the reasonableness of past motor carrier practices (an unfounded assumption), such jurisdiction is in any event conferred by that decision, which recognizes the ICC's exclusive and plenary powers over motor carrier practices.

¹² In contending that the court of appeals erred in relying upon the decision in *Seaboard*, *supra* (Pet. Br. 16-18), petitioners again claim that the difference between the ICC's powers over rail

The authority relied upon by petitioners in support of their contention that the ICC has no independent power to bar the collection of filed rates, is inapposite. (Pet. Br. 13-16). In both *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951) and *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), the involved agency had no authority to provide the relief sought. In *Montana-Dakota*, a utility company filed suit in federal court seeking reparations for unreasonable electric rates. The Court concluded that since the Federal Power Commission had no power to grant reparations, 341 U.S. at 254, 258, and since a district court cannot decide the reasonableness of a rate, *Id.* at 251-252, the complaint failed to state a cause of action. As shown herein, the ICC has authority, under the statute and the decisions of this Court, to decide the lawfulness of past motor carrier rates and practices.

The decision in *T.I.M.E.* concluded that the 1935 Motor Carrier Act did not provide a cause of action to shippers for the recovery of past unreasonable rates, nor did it permit them to assert unreasonableness as a defense to undercharge suits. 359 U.S. at 470. Correct as this decision may have been in 1959, it was overruled in 1965 when Congress enacted leg-

rates and practices, on the one hand, and motor rates and practices, on the other, invalidates the ICC's action in this case. However, as discussed, despite the differences in procedure, the ICC has exclusive jurisdiction to decide motor carrier cases. The fact that a shipper's complaint in such cases is filed with a court pursuant to Section 11706(c)(2) of the Act instead of directly with the ICC is of no substantive significance and does not, as petitioners claim, vest exclusive jurisdiction in the court. (Pet. Br. 17).

islation, now codified as Section 11705(b)(3),¹³ providing a statutory reparations remedy in the ICC. That legislation, along with the ICC's reasonableness jurisdiction and the *Hewitt-Robins* decision, empowers the ICC to grant the relief it provided in this case.¹⁴

Petitioners further claim that the legislative history of the 1965 amendments to the Act supports their position that the ICC may not order the waiver of filed rates because of a carrier's past practices. (Pet. Br. 18-24). The short answer to this contention is that, in light of the plain statutory language, the legislative history is irrelevant. Sections 10701(a) and 11705(b)(3) provide for the waiver of filed rates by the ICC; accordingly, they authorized the Commission's action in this case. The ICC decided that it would be an unreasonable practice in violation of Section 10701(a) for Quinn to collect its filed rates from Primary—rather than the lower negotiated rates—for certain past shipments. The Commission reviewed Quinn's practices under the standards of its exclusive reasonableness jurisdiction and concluded that such practices, which included the attempted collection of its filed rates, were unreasonable and barred such

¹³ Pub. L. No. 89-170, 79 Stat. 651-652.

¹⁴ Petitioners allege (Pet. Br. 14-15), that Section 10701(a) does not afford shippers "a cause of action or defense" for a carrier's violation of that Section. They fail, however, to go the next step. Both Section 11705(b)(3) and the decision in *Hewitt-Robins*, *supra*, afford such remedy in conjunction with a finding by the ICC that imposition of a motor carrier rate violates Section 10701(a). Similarly, petitioners' argument that there is no common law right to a reasonable rate (Pet. Br. 15-16) is immaterial. The ICC's decision below was founded on its statutory authority over unreasonable motor carrier practices.

collection. The ICC's decision constituted a finding as to the lawfulness of both Quinn's rates and practices; it sustained Primary's claim that the negotiated rates—and not the filed rates—were the maximum lawful and reasonable rates it should be required to pay.

Section 11705(b)(3) authorizes the ICC to award damages for the imposition of rates it finds to be in violation of the Act. Contrary to petitioners' claim (Pet. Br. 23-24), the relief is not limited to those rates which are unreasonable; instead, it encompasses the imposition of rates the ICC "finds to be in violation of" any provision of the statute. This statutory language embraces the ICC's finding that Quinn's collection of the filed rates would be an unreasonable practice under Section 10701(a). In other words, the Commission concluded, in the language of Section 11705(b)(3), that it would violate the Act for the filed rates to be imposed on the shipper's traffic. Its decision barring the collection of those rates is, therefore, a decision the ICC is empowered under Section 11705(b)(3) to make.¹⁵

¹⁵ The very legislative history of the 1965 amendments to the Act upon which petitioners rely, which amended former Section 204a and is now codified as Section 11705(b)(3), confirms the ICC's statutory authority to bar the collection of filed rates because of the unreasonableness of past motor carrier practices. The House Report's summary states that:

[The act] would permit a court of competent jurisdiction to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers. . . . This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to

Petitioners' final statutory argument is that Section 204a of the Act, the pertinent provisions of which are recodified in Section 11705(b)(3), limited actions against motor carriers to "reparations" and that no changes in this limitation were made by the Act's 1978 recodification. (Pet. Br. 19-20, n. 11). But the reparations definition contained in the prior statute was not limited to recovery for unreasonable rates; instead, it provided for reparations for charges found by the ICC to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or prejudicial. Former Section 204a(2) and (5).

While the statutory language provides ample authority for the decision of the court below, it is, in any event, well-settled that the ICC has broad discretion to fashion appropriate remedies, not specifically set forth in the statute, for violations of the Act. For example, in *I.C.C., supra*, 467 U.S. at 364-365, this Court held that the ICC's authority is not bounded by the powers enumerated in the Act; instead it has discretion to take actions that are legitimate, reasonable, and directly adjunct to its statutory power. The Court added that: "Congress has expressly provided that powers enumerated in the Interstate Commerce Act do not preclude the Commission from taking other actions consistent with its statutory duties. § 10321(a)". *Id.* at 359, n. 3. *See*

aid the court by making necessary administrative determinations relating to the amount of reparations.

H.R. Rep. No. 253, 89th Cong., 1st Sess. 12-13 (1965). (Emphasis supplied). Accordingly, the ICC, in tandem with the referring court, is empowered to grant relief for past "violations" of the Act by motor carriers, which includes unreasonable practices, and not just for past unreasonable rates.

also, *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 352 (1982) ("The remedies for a carrier's violation of the regulations are best left to the ICC for such resolution as it thinks proper"). The ICC has, accordingly, both explicit and implicit authority to fashion the remedies it deems appropriate for violations of the Act it administers. At a minimum, its action here is a reasonable adjunct to its statutory power to ensure the reasonableness of both motor carrier rates and practices.

In an "extra-statutory" contention, petitioners claim that Primary's defense was asserted "outside of . . . the Act" (Pet. Br. 24). Primary's defenses to the carrier's lawsuit were firmly grounded in specific provisions of the Act, including Section 10701(a), and the decision of the court below was based on those provisions. A shipper's claim to a rate other than a filed rate is not an "extra-statutory" claim; it is based on the statute, which empowers the ICC to decide it.

Petitioners finally attack the finding of the court below that the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 ("1980 Act"), supports the ICC's decision. (Pet. Br. 26-31). Petitioners assert that since the 1980 Act did not alter the filed rate requirement, that legislation provides no basis for the ICC's action. First, as discussed, the ICC in this case has in no way modified the filed rate doctrine; carriers are still required to publish their rates in tariffs, to file those tariffs with the ICC, and to charge only their tariff rates. Nor does the court below suggest that the ICC has engaged in such modification—pursuant to the 1980 Act or anything else. The ICC has, instead, allowed shippers to assert their statutory defenses to the attempted collection of filed rates.

Second, wholly apart and independent from the 1980 Act, the short answer to petitioners is that the ICC has the statutory authority to decide the issues involved in this case. And as the court below recognized, 879 F.2d at 406, the ICC's re-evaluation of its regulatory policy concerning negotiated rates cases was based upon that statutory authority over unreasonable practices, and was undertaken with the clear realization that it must be conducted within the requirements of the filed rate doctrine. While the 1980 Act may have prompted the ICC's re-evaluation, the statutory basis therefor was already firmly in place.

In sum, the plain language of the relevant portions of the Act, its legislative history, and this Court's decision in *Hewitt-Robins*, *supra*, authorize the ICC to declare the collection of a filed rate unreasonable. Petitioners' crabbed interpretation of that authority is not supported.

C. The Court Below Properly Concluded That, In View Of Its Exclusive Jurisdiction To Decide Them, The Reasonableness Issues Here Presented Were Required To Be Referred To The ICC

The ICC's exclusive authority to decide the reasonableness of motor carrier rates and practices requires that, when such an issue is raised in a proceeding involving the collection of a motor carrier's filed rate, the proceeding must be stayed and the issue referred to the ICC. Because of this exclusive jurisdiction over such issues, this Court has consistently recognized that the Commission alone is empowered to decide them.¹⁶ For example, in *Texas*

¹⁶ Because of the ICC's exclusive jurisdiction to decide the

& *P.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907), the Court stated:

"[An action] predicated upon the unreasonableness of the established rate must under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable . . ."

And as Justice Brandeis said in *Great Northern*, *supra*, 259 U.S. at 291 (1922): "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission".

The Court held in *Western Pacific*, *supra*, 352 U.S. 59, that where a defense of unreasonableness is raised by a shipper in a suit by a carrier to recover undercharges, a court has no jurisdiction to decide that defense; instead, it must refer the matter to the ICC for an initial determination just as if the issue had been raised in a reparations action by the shipper. The Court explained that the doctrine of primary jurisdiction:

"[A]pplies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special

issues here presented, referral of those issues to it was not a "procedural improvisation" (Pet. Br. 12)—it was a procedural requirement.

competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

Id. at 63-64. Specifically with respect to an issue as to the reasonableness of a tariff, the Court noted that such issue is "recognized by all to be one for the Interstate Commerce Commission". *Id.* at 68.¹⁷ And, quoting from the decision in *Union Pacific R. Co. v. United States*, 111 F.Supp. 266 (Ct. Cl. 1953), the Court observed that: "[T]he question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission." *Id.* at 69, n. 10. More recently, in *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 325 (1981), the Court again stated that: "The judgment as to what constitutes reasonableness belongs exclusively to the [Interstate Commerce] Commission." In *Hewitt-Robins, supra*, the Court confirmed that the ICC's primary jurisdiction extends not only to the issue of the reasonableness of a carrier's rates, but also to issues as to the reasonableness of its rate-related practices. 371 U.S. at 88.

Other courts have similarly held that the ICC must, in the first instance, decide whether the practices engaged in by carriers subject to its jurisdiction pass muster under the Act. For example, the United States Court of Appeals for the 8th Circuit has held that:

¹⁷ When Congress amended Part II of the Act in 1965 to permit shippers to recover for past unreasonable motor carrier charges, it recognized the need for the referral to the ICC of such cases. (The ICC "would be called upon to aid the court by making necessary administrative determinations.") H.R. Rep. No. 253, 89th Cong. 1st Sess., pp. 12, 13 (1965).

"The doctrine of primary jurisdiction requires the court to refer the matter to the ICC when, as here, the claim presented to the court requires an inquiry into the lawfulness of a carrier's practice" *Iowa Beef Processors v. Ill. Central Gulf R. Co.*, 685 F.2d 255, 260-261 (1982) (citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431-432 (1940)). "[T]he court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practice under the terms of the Act . . ." And in *Western, supra*, 682 F.2d at 1232, the court of appeals reversed a district court decision that a tariff notation was unreasonable, since "[O]nly the ICC can do that . . ."¹⁸

¹⁸ See also *Baltimore & Ohio Railroad v. United States*, 305 U.S. 507 (1939); *Interstate Commerce Commission v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-580 (1966); *St. Louis, Brownsville & Mexico Ry. Co. v. Brownsville Navigation District*, 304 U.S. 295, 301 (1938); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304 (1976); *Far East Conference v. United States*, 342 U.S. 570, 574-575 (1952); *Pennsylvania R. Co. v. Clark Brothers Coal Mining Co.*, 238 U.S. 456, 469 (1915); *In re Penn Central Transportation Co.*, 477 F.2d 841, 844 (3rd Cir. 1973), *cert. denied*, 414 U.S. 923 (1973); *Chicago R.I. & P.R. Co. v. Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385, 386-389 (8th Cir. 1970); *Middlewest Motor Freight Bureau v. U.S.*, 433 F.2d 212, 222 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *Seaboard, supra*, 794 F.2d at 638 ("finding a carrier practice unreasonable is the kind of determination that lies in the primary jurisdiction of the Commission."); *Hansen v. Norfolk & W. Ry. Co.*, 689 F.2d 707 (7th Cir. 1982); *Associated Transport, supra*, 505 F.2d at 369; *United States v. United States Steel Corp.*, 645 F.2d 1285, 1291 (8th Cir. 1981); *INF, Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546, 548 (8th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3412 (U.S. Dec. 14, 1989) (No. 89-936); *West Coast, supra*, 893 F.2d 1016; *Delta Traffic, supra*, 893 F.2d 472; *National Motor Freight, supra*, 268 F. Supp. at 92. But see,

The ICC possesses exclusive authority to address the question of what rate may be charged by a carrier. Hence, if a motor carrier brings an action for undercharges and the shipper asserts the defense that collection of the undercharges would be an unreasonable practice in violation of the Act, the court case must be stayed and the matter referred to the ICC. The court below correctly concluded that, under well-settled principles of primary jurisdiction, the unreasonable practice issue involved in this case was required to be referred to the Commission for its determination.

CONCLUSION

For the foregoing reasons, the ICC's decision in this case was a proper exercise of the authority conferred upon it by the Act and by the decisions of this Court. Accordingly, the decision of the court below should be affirmed.

Respectfully submitted,

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No. 89-624

In The

Supreme Court of the United States

October Term, 1989

MAISLIN INDUSTRIES, U. S., INC., ET AL.,

Petitioners.

v.

PRIMARY STEEL, INC.,

*Respondent.*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**AMICUS CURIAE BRIEF
OF SUPREME BEEF PROCESSORS, INC.
IN SUPPORT OF RESPONDENT**

Supreme Beef Processors, Inc., respectfully submits
its Brief as *Amicus Curiae* in support of Respondent.

INTEREST OF AMICUS CURIAE

Supreme Beef Processors ("Supreme Beef") is a processor and shipper of ground beef and related products, headquartered in Dallas, Texas. Supreme Beef is the Petitioner in Case No. 88-1958, *Supreme Beef Processors, Inc. v. Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc.*, currently pending on Petition for Certiorari before this Court. Following the filing of the Petition in that case on May 30, 1989, the Court on October 2, 1989, entered an order inviting the Solicitor General to file a brief in that proceeding expressing the views of the United States. The Solicitor General in

December, 1989, filed a brief indicating that the issues in No. 88-1958 were largely identical to those in the instant proceeding and taking a position in support of both Supreme Beef in No. 88-1958 and the Respondent, Primary Steel, Inc. ("Primary Steel") in the instant proceeding. The Solicitor General, however, stated that the procedural posture of the instant case made it a preferable vehicle for Court review. He accordingly recommended that the Court grant certiorari in the instant case and hold No. 88-1958 in abeyance to be decided in accordance with the outcome of this case.

The factual and legal issues involved in No. 88-1958 are virtually identical to those in the instant proceeding. In both cases, the non-carrier parties were shippers who had negotiated with motor common carriers to have particular rate levels applied to their shipments. In both cases, the carriers induced the shippers to use the carriers' services by representing that they could perform service for the shippers at specified rates. In both cases, the carriers billed and collected based upon the negotiated rates. In both cases, the shippers received no indication from the carriers that the rates quoted, billed, and collected were not filed with the Interstate Commerce Commission ("ICC"). Much later, after the carriers had ceased operations through bankruptcy, the same collection agency, Carrier Credit and Collection, Inc. (itself now bankrupt), brought actions against both shippers on behalf of the carriers' respective bankruptcy trustees to collect "undercharges." These actions were based upon the higher tariffs which had remained on file because of the carriers' failures to file the lower rates which they had promised the shippers.

The collection action against Supreme Beef was filed in the United States Bankruptcy Court for the Northern District of Texas. Like Primary Steel, Supreme Beef

filed affirmative defenses alleging that collection of charges based on tariffs which had remained on file only through the carrier's misrepresentation or negligence should be found to be an unreasonable practice prohibited by 49 USC. § 10701. Unlike the court in *Primary Steel*, however, the court in *Supreme Beef* declined to permit referral. Rather, summary judgment was entered in favor of the carrier based on the higher tariff levels which the carrier had promised to cancel.

Supreme Beef's motion for referral relied extensively on a then-pending proceeding before the ICC in which a major national transportation organization, The National Industrial Transportation League, had sought promulgation of a rule by the ICC declaring assessment of published rates to be unreasonable under circumstances similar to those alleged by Supreme Beef. Ex Parte No. MC-177, *National Industrial Transportation League - Petition To Initiate Rulemaking on Negotiated Motor Common Carrier Rates* ("Negotiated Rates"). On October 29, 1986, ICC issued its first decision in that proceeding at 3 ICC 2d 99 ("Negotiated Rates I"). The ICC stated that Congress in the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, had amended the National Transportation Policy to require the ICC to promote competitive, innovative, and individualized price and service options to meet changing market demand. Pub. L. 96-296 § 4, 49 USC § 10101 (a)(7). *Negotiated Rates I*, *supra*, at 3 ICC 2d 105. The ICC noted that passage of the 1980 Act allowed it to eliminate prohibitions against rates applicable to only one shipper, permit common carrier rates to be filed on short notice, and permit common carriers to perform service as contract carriers as well. *Id.* at 105, 106.

The ICC also stated that with increased competition under the 1980 Act, shippers and carriers were called

upon to negotiate hundreds or even thousands of individual motor common carrier rates daily. *Id.* at 105. Such increased competitive activity made it extremely difficult for shippers to determine prior to movement whether agreed rates actually were on file. It also placed greater importance on the accuracy of carriers' representations concerning their rate levels. *Id.* at 105, 106. Because of these circumstances, the ICC stated that, under appropriate circumstances, it would find that carrier attempts to collect their published charges would be found to constitute unreasonable practices in violation of 49 USC § 10701(a), where the carrier had negotiated a lower rate with the shipper and had indicated that the negotiated rate would be the one charged and filed as a tariff. *Id.* at 107.¹

Following the lower court's denial of referral to the ICC, Supreme Beef filed an appeal in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the lower court in *Supreme Beef Processors, Inc. v. Yaquinto*, 864 F2d 388 (5th Cir. 1989). The decision of the Fifth Circuit is totally contrary to the decision of the Eighth Circuit under review in this case. The Fifth Circuit held that carrier practices of the type encountered by both Supreme Beef and Primary Steel could not constitute a defense to a motor carrier action to collect published freight charges. The Fifth Circuit stated that allowing such a defense to be asserted and referred to the ICC for decision would create an exception to the requirement of 49 USC § 10761 that carriers

¹ On June 29, 1989, the ICC issued a supplemental decision reviewing and clarifying its earlier decision in *Negotiated Rates I*. This decision, Ex Parte No. MC-177, *National Industrial Transportation League - Petition To Initiate Rulemaking on Negotiated Motor Common Carrier Rates*, 5 ICC 2d 623 (1989) ("*Negotiated Rates II*") reemphasizes the ICC's concern with carrier practices of the type faced by Supreme Beef and Primary Steel. *Id.* at 621-634.

must collect their filed tariff charges. *Id.* at 392. The court rejected decisions such as *Seaboard System R.R. v. United States*, 794 F2d 635 (11th Cir. 1986) and *Western Transportation Co. v. Wilson Co.*, 682 F2d 1227 (7th Cir. 1982), upholding exclusive ICC jurisdiction over unreasonableness of carrier rates and practices and affording shippers a right to ICC consideration of such issues as defenses to carrier collection actions. The court also found that allowing such defenses would be contrary to prior Fifth Circuit decisions requiring payment of freight charges pending evaluation of their reasonableness by the ICC, citing *Southern Pacific Transp. Co. v. City of San Antonio*, 748 F2d 266 (5th Cir. 1984). *Id.* at 391-92.

Supreme Beef, like Primary Steel, the Solicitor General, and the numerous other *amici*, submits that decisions such as that of the Fifth Circuit simply are legally incorrect. Such decisions deprive shippers of their right to protection against unreasonable motor carrier practices guaranteed by 49 USC § 10701(a). Supreme Beef's purpose in submitting this Brief is to underscore the need for a decision from the Court which will clearly overrule these cases and affirm the right of shippers to the referral process afforded to Primary Steel by the courts and the ICC.

SUMMARY OF ARGUMENT

The provisions of 49 USC § 10701(a) require the practices of motor carriers subject to the jurisdiction of the ICC to be reasonable. The ICC under this statute has powers broad enough to cover any unreasonable practice of a motor common carrier. Such practices specifically include those relating to carrier rates. Both the courts and the ICC have held that shippers injured by

unreasonable carrier practices are entitled to raise such issues in court proceedings and then seek determinations from the ICC entitling them to recovery of money damages for the practices found to be unreasonable.

While 49 USC § 10761 also requires that carriers collect charges according to their published rates, application of the ICC's reasonableness powers to such published rates can operate to set aside either those rates or their application. The doctrine that *courts* are not empowered to set aside a published rate in no way limits the power of the ICC to do so. The ICC's Policy Statement in *Negotiated Rates I* and *II* is totally in accord with 80 years of judicial interpretation of the Interstate Commerce Act. The Court should affirm the decision of the Eighth Circuit in this proceeding.

ARGUMENT

I.

THE ICC IS EMPOWERED BY STATUTE TO DETERMINE THAT THE CARRIER CONDUCT IN THIS CASE CONSTITUTES AN UNREASONABLE PRACTICE PROHIBITED BY 49 USC § 10701(a), THUS BARRING COLLECTION OF FREIGHT CHARGES RESULTING FROM THAT CONDUCT.

The fundamental issue for decision by the Court is whether the long-exercised statutory power of the ICC to declare motor carrier rates or their collection unreasonable may be negated by over-extension of the statutory requirement that carriers initially charge their published rates. The policy announced by the ICC in *Negotiated Rates I* and *II* and applied in many succeeding cases is an exercise of the long-established statutory powers of the ICC, currently codified at 49 USC § 10701(a), to declare that application of rates in

carrier tariffs may constitute unreasonable practices. Such findings require that court actions for collection based upon such rates must be dismissed.

Petitioners' position before this Court ignores this important statutory function of the ICC. Rather, Petitioners would extend case precedents which bar courts from considering misrepresentation, fraud, or prior agreement as defenses to the collection of published charges to bar *the ICC* from considering such factors in the exercise of its powers over unreasonable practices under 49 USC § 10701(a). Such a theory represents a perverse statutory construction which this Court should not allow. In the words of the Eleventh Circuit, prior to the inception of the present controversy, "the courts [had] never held that the ICC lacks authority to prohibit the unreasonable collection of undercharges." *Seaboard System R. R., Inc. v. United States*, *supra*, 794 F2d at 638.

This Court frequently has noted that the powers granted to the ICC to prohibit unreasonable carrier practices are extremely broad. The ICC's recodified statutory powers at 49 USC § 10701(a) are derived from prior statutes affecting both rail and motor carriers. The statute states that the ICC's reasonableness powers extend to "any practice related to transportation or service provided by a carrier." The predecessor to this provision originally enacted by Congress in 1906 emphasized the breadth of these powers even more strongly, applying them to "any regulations or practices whatsoever" of a carrier affecting common carrier rates and charges. *Interstate Commerce Commission v. Illinois Central Railroad Co.*, 215 U.S. 452, 475 (1910). The ICC itself has construed its unreasonable practices powers as "broad enough to cover any unreasonable practice of a common carrier" and controlling "whatever regulations and practices" enter into the application of

carrier rates. *Postal Telegraph Cable Co. v. W.U. Telegraph Co.*, 59 ICC 512, 516 (1920); *Stopping Of Cars in Transit to Complete Loading*, 36 ICC 130, 132 (1915).

The categories of carrier conduct which the ICC has found to constitute unreasonable practices range across the entire spectrum of transportation activities having an impact on the charges ultimately paid by shippers. Very early in its existence, the ICC held that it could be an unreasonable practice for carriers to publish rate provisions and billing documents which were likely to mislead the shipping public or suggest that rates higher or lower than those actually on file would be charged. *In The Matter of Released Rates*, 13 ICC 550, 562, 564 (1908). The ICC has repeatedly held that the fact that a rate is contained in a published tariff and is found to be reasonable in its own right does not prevent application of that rate from constituting an unreasonable practice in particular circumstances. *National Wool Growers Association v. Union Pacific R. Co.*, 49 ICC 55, 58 (1918); *Albers Bros Milling Co. v. Great Northern Ry. Co.*, 256 ICC 491, 500 (1943). Both this Court and the ICC have held that shippers injured by unreasonable carrier practices are entitled to recovery of money damages from the carriers involved. *Hewitt-Robins v. Eastern Freight-Ways*, 371 U.S. 84 (1962); *Adams v. Mills*, 286 U.S. 397, 407-8 (1932); *Bud Antle, Inc. v. United States*, 593 F2d 865, 875 (9th Cir. 1979); *Pensick & Gordon, Inc. v. California Motor Express*, 323 F2d 769 (9th Cir. 1963), *cert. den.*, 375 U.S. 984 (1964); *Albers Bros. Milling Co. v. Great Northern Ry. Co.*, *supra*, 256 ICC at 500; *Hawkins & Sons v. Director General*, 80 ICC 225, 227 (1923).

Petitioners' argument in declining to recognize the power of the ICC to find that continuing rate misrepresentation constitutes an unreasonable practice urges

in effect either that (1) the ICC lacks power to find that assessment of a published rate constitutes an unreasonable practice or (2) the practices alleged by shippers such as Primary Steel or Supreme Beef and noted by the ICC in *Negotiated Rates I* and *II* could never be found to be unreasonable within the meaning of 49 USC § 10701(a). Both of these propositions are patently untenable. From the very onset of regulation, the ICC has exercised its powers to declare carrier rates and practices unreasonable to relieve shippers from their obligation to pay published carrier charges. This fact is imbedded in the very quotation of Justice Hughes recited by the Petitioners in support of the primacy of filed rates (Petitioner Br. at 10). The full statement of law by Justice Hughes explaining the interrelation between the ICC's reasonableness powers and the duty of carriers to collect their published charges reads as follows:

The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the commission to be unreasonable*. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination. *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94, 97 (1915) (emphasis added).

Petitioners' suggestion in their brief that shippers lack a "legally cognizable right to a non-tariff

rate"² ignores the numerous court decisions differentiating between the "legal rate" contained in the carrier's tariff which the carrier is initially required to charge and the "lawful rate" ultimately established by an ICC decision following a shipper objection that the "legal rate" was unreasonably high. *Arizona Grocery Co. v. Atchison T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932); *Middlewest Motor Freight Bureau v. U.S.*, 433 F2d 212, 238-39 (8th Cir. 1970), cert. den., 402 U.S. 999 (1971). It is only the lawful rate which the shipper is required to bear. Petitioners simply are wrong in their assertion that the "filed tariff doctrine" created by 49 USC § 10761 bars the ICC from finding a tariff or its application to be unreasonable so as to allow a shipper to avoid payment of the charges contained in that tariff.

There similarly is no merit to any argument that the unreasonable practice defenses raised by shippers under 49 USC § 10701 must be rejected because of inconsistency with the rate filing requirements of 49 USC § 10761. The fact that the claimed unreasonable practice involves fraud or misrepresentation in description of the carrier's legally effective rates does not constitute a bar to the ICC's exercise of its unreasonable practice jurisdiction. The line of cases which holds that fraud, misrepresentation, or other equitable defenses may not be asserted in carrier actions to collect published rates applies only to those situations where shippers seek to invoke the powers of equity granted to courts. No similar prohibition, however, applies to the ICC. Under the ICC's reasonableness powers, the same facts which could not be asserted as a common law or equitable defense to payment of freight charges in a court proceeding may constitute a basis for the ICC to find either that published rates themselves are un-

² Petitioner Br. at 13.

reasonable or that the collection of such rates would be unreasonable.

The decisions of the ICC and the courts are replete with examples of situations in which equitable circumstances which could not be asserted as common law defenses to collection of filed rates in court proceedings have been found to support ICC findings of unreasonableness. For example, even before the effectiveness of deregulation legislation concerning the rail and motor carrier industries in 1980, the ICC had recognized that public policy considerations concerning rail rates warranted a presumption that any published rate in excess of the rate agreed upon between a carrier and shipper and relied upon the shipper would be unreasonable. *Ex Parte No. 358-F Change of Policy, Railroad Contract Rates*, 45 Fed. Reg. 21719 (April 2, 1980, reported in *Cleveland Cliffs Iron Co. v. ICC*, 664 F2d 568, 573 (6th Cir. 1981)). See also, *Coal Colstrip, Kuehn and Decker, MT, To Superior Wi*, 364 ICC 152 (1980); *Unit Train Rates - Coal Burlington Northern, Inc.*, 364 ICC 186 (1980) *affd. sub nom Iowa Power and Light Co. v. Burlington Northern, Inc.*, 647 F2d 796 (1981) cert. den., 455 U.S. 907 (1982); *Annual Volume Rates on Coal - Flint Creek, AR*, 364 ICC 753 (1981), *affd. sub nom. Burlington Northern, Inc. v. United States*, 679 F2d 915 (1982).

Many prior decisions of the ICC also had recognized that an agreement between a shipper and a carrier to charge particular rates could be given evidentiary effect in determining whether higher published rates should be found unreasonable. *Piedmont Mills, Inc. v. Norfolk & W. R. Co.*, 296 ICC 481, 485 (1955) (carrier misquotation and acceptance of lower charges over 3-year period); *Ideal Cement Co. v. Atchison, T. & S. F.*, 280 ICC 55, 59 (1951) (confusing tariff and carrier offer to

establish clarifying tariff); *Carson Iron & Steel Co. v. Atlantic & N. C. R. Co.*, 237 ICC 724, 728 (1940) (carrier error in tariff publication); *Sheboygan Fruit Box Co. v. Chicago & N. W. Ry. Co.*, 214 ICC 157 (1936) (mutual assumption that cancelled rate had remained in effect); *Sutherland Paper Co. v. Ann Arbor R. Co.*, 215 ICC 344 (1936); *Armour & Co. v. Northern Pacific Ry. Co.*, 209 ICC 277 (1935); *C. A. Wagner Construction Co. v. Chicago & N. W. Ry. Co.*, 208 ICC 767 (1935) (emergency need to move shipments before agreed rate could be placed in effect).

In still other cases, the ICC had found that it would be an unreasonable practice to apply published tariffs in particular transportation circumstances. *Thermofil, Inc. v. Jones Transfer Co.*, *supra*, 355 ICC 828 (charges for trailer use by carrier not owning trailer); *Iowa Beef Processors, Inc. v. Western Transportation*, ICC Docket No. 37521 (not printed; September 14, 1981), cited in *Western Transportation Co. v. Wilson & Co.*, *supra*, 682 F2d at 1231; *Standard Brands, Inc. v. Central R. Co. of N. J.*, *supra*, 350 ICC 555 (document notation requirement unrelated to transportation service).

Even prior to *Negotiated Rates I*, the Eleventh Circuit had given specific approval to the ICC's determination that carrier conduct with respect to a published tariff could constitute an unreasonable practice barring application of that tariff. In *Seaboard System R. R. v. United States*, *supra*, 794 F2d 635, the Eleventh Circuit reviewed an ICC decision³ in which a carrier advised a shipper that a particular rate would be charged based on what the Eleventh Circuit described as a "somewhat unclear published tariff." *Id.* at 636. Closer analysis of the tariff, first by the carrier and then by the ICC,

³ *Buckeye Cellulose Corp. v. Louisville & Nashville R. R. Co.*, 1 ICC 2d 767 (1985).

revealed, however, that the tariff was unambiguous and provided for a higher rate than had been quoted and agreed to. The court in *Seaboard* noted that the critical factor for the ICC was "the carrier's continuing conduct in misleading the shipper as to the applicable tariff rate." *Id.* at 639. When the carrier advised the shipper that it had changed its interpretation of the tariff, the ICC ruled that the unreasonableness of the carrier's practice came to an end. *Id.* The Eleventh Circuit confirmed the statutory power of the ICC under 49 USC § 10701(a) to "prohibit the unreasonable collection of undercharges." *Id.* at 638.⁴

The policy announced by the ICC in *Negotiated Rates I* and *II* is a logical extension of these previously exercised powers. The ICC noted that the primary evil which the tariff filing requirement of 49 USC § 10761

⁴ While apparently conceding that *Seaboard* was correctly decided, Petitioners attempt to distinguish it by reference to differences between the rail and motor carrier portions of the underlying statute. Petitioners contend that the rail provisions authorize the ICC to find unreasonable practice violations on past shipments while the motor carrier provisions do not (Petitioner Br. at 17). In reality, there is little difference between the statutory language. The rail language [at 49 USC § 10704(a)(1)] permits the ICC to "order the carrier to stop the violation," while the motor carrier language [at 49 USC § 10704(b)(1)] permits the ICC to "prescribe the . . . practices to be followed." Construing the motor carrier statute as not pertaining to past shipments, moreover, is inconsistent with the one power which Petitioners concede to the ICC: declaring rates on past motor carrier shipments to be unreasonable (Petitioner Br. at 23). Former § 204a of the Interstate Commerce Act, cited by Petitioners as the source of the ICC's powers to declare past motor carrier rates unreasonable, stated that such findings of past unreasonableness were to be made "upon complaint made as provided in [former] § 216(e)." Former 49 USC § 304a(5). The present 49 USC § 10704(b)(1) is the recodified version of the former § 216(e). Historical and Revision Notes following 49 USC § 10704, 49 USCA Transportation [Partial Revision], 1989 Pamphlet at 261. Petitioners' argument that 49 USC § 10704(b)(1) applies only to future shipments would serve to destroy the remedy for past unreasonableness of rates described at pages 18-23 of Petitioners' Brief.

was designed to prevent — discrimination between shippers — had been reduced in practical significance by substantial increases in carrier rate flexibility adopted after the Motor Carrier Act of 1980. *Negotiated Rates I*, *supra*, 3 ICC 2d 104. The ICC decided that assignment of controlling weight to prior negotiations or misrepresentation would be granted only on a case-by-case basis, reflecting the particular facts of individual situations. *Id.* at 106, 107. On a particular record, if it could be shown that a shipper-carrier negotiation of rates without a subsequent carrier rate filing was effected to obtain discriminatory treatment, the ICC would be free to reject a finding of unreasonable practices and protect the policies of 49 USC § 10761. As the ICC noted, its right to change its interpretation of statutes to meet changing factual or policy situations is clearly established by decisions of this Court in *Chevron U.S.A., Inc. v. Natural Resource Defense Counsel*, 467 U.S. 837 (1984) and *American Trucking Associations, Inc. v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, 416 (1967).⁵

There is no merit to Petitioners' argument that shipper rights to damages for past unreasonable practices are barred by this Court's decision in *T.I.M.E., Inc. v. U.S.*, 359 U.S. 464 (1959). The Court's holding in *T.I.M.E.* must be construed in light of its holding on

⁵ Petitioners are incorrect in their suggestion argument that rejection or diminution of the ICC's rate reasonableness powers is dictated by this Court's decision in *Square D Co. v. Niagara Frontier Tariff Bureau*, 486 U.S. 409 (1986). *Square D* makes three specific references confirming the powers of the ICC to set aside rates contained in published tariffs. *Id.* at 416; 416 n. 18; 418 n. 22. One of these references is a lengthy footnote describing the unreasonable-ness remedy available to shippers before the ICC and citing the existence of this remedy as the basis for barring parallel remedies under the antitrust laws. *Id.* at 416, n. 22. Any suggestion that *Square D* constitutes authority for the proposition that a filed rate may not be set aside by the ICC is simply incorrect.

similar issues three years later in *Hewitt-Robins v. Eastern Freight-Ways*, *supra*, 371 U.S. 84. While *Hewitt-Robins* did not disturb the specific holding of *T.I.M.E.*, the rationale and discussion in *Hewitt-Robins* provides a significantly narrower rationale for the *T.I.M.E.* result than that set forth in the *T.I.M.E.* opinion. Indeed, two members of the five member majority in *T.I.M.E.*, Justices Harlan and Stewart, protested in dissent that much of the *Hewitt-Robins* rationale was inconsistent with the rationale expressed in *T.I.M.E.*. *Hewitt-Robins*, *supra* at 371 U.S. 89-93.

Hewitt-Robins holds that the ICC is authorized to make findings in aid of courts as to the reasonableness of past motor carrier practices, when such issues are raised in defense of carrier actions to collect freight charges. In *Hewitt-Robins*, the shipments moved between points in one state over interstate routes. The rate sought to be collected by the motor carrier was the published interstate rate. The *Hewitt-Robins* shipper, however, claimed that it was required to pay only a lower rate which would have been applicable had the shipments moved over an intrastate route. According to the shipper, the carrier had a common law duty to move its shipment over the cheapest available route. The *Hewitt-Robins* court found that the carrier's breach of this duty constituted an unreasonable practice and that the ICC had primary jurisdiction to evaluate that issue.

The *Hewitt-Robins* court conceded that, under *T.I.M.E.*, no common law remedy remained for recovery of past payments of unreasonably high freight charges. The Court found that these remedies had been extinguished because Congress had created a statutory system providing for advance notice and advance protesting of the unreasonableness of proposed rates.

Hewitt-Robins, supra, at 371 U.S. 87. In the case of unreasonableness of practices, however, the Court noted that no parallel statutory remedies had been created and thus the prior common law remedy survived. *Id.* at 87. Thus, while legislation was necessary to reinstate the post-shipment damage remedies for rate unreasonableness found non-existent in *T.I.M.E.*, no similar legislation was required with respect to post-shipment unreasonable practice remedies. Petitioners' arguments that the 1965 legislation in Pub. L. 89-170, 79 Stat. 651, September 6, 1965, failed to embrace unreasonable practices is rendered irrelevant by the fact that these remedies had continued in existence under *Hewitt-Robins*. Rather, that legislation served only to reestablish the parallel damage remedies involving past unreasonable rates which had existed prior to this Court's decision in *T.I.M.E.*.

The identical nature of damage remedies involving past unreasonable rates and past unreasonable practices also is reflected in the Congressional recodification of the Interstate Commerce Act in Pub. L. 95-473, 92 Stat. 1337, October 17, 1978. The recodification created unitary provisions to continue postshipment damage remedies applying to both unreasonable rates and unreasonable practices. See 49 USC §§ 10701(a), 10704(b)(1), 11705(b)(3), 11705(c)(1), 11706(c)(2). This combination of previously separate provisions regarding rate and practice unreasonableness was explained by the recodifiers as correcting variances and inconsistencies in the use of synonymous terms in the prior statute. See Historical and Revision Notes following 49 USC § 10101, 49 USCA Transportation [partial revision], 1989 Pamphlet, at 97-98. While recodification was not intended to alter the prior substantive law, the language chosen by Congress in recodification serves as a guide to the meaning of the original act. *Purolator Courier*

Corp. v. ICC, 598 F2d 225, 227 at n.5 (D.C. Cir. 1979). Petitioners' arguments that the prohibitions of the *T.I.M.E.* case serve to bar damage remedies involving past unreasonable practices thus are without merit.

II.

SHIPPERS ARE ENTITLED TO RAISE ISSUES OF UNREASONABLE PRACTICES AS DEFENSES TO MOTOR CARRIER ACTIONS TO COLLECT FREIGHT CHARGES AND ARE NOT REQUIRED TO PAY THE CHARGES PRIOR TO CONSIDERATION OF THESE DEFENSES BY THE ICC.

The Court should also reject any notion in the cases below that unreasonable practice issues are not defenses to carrier actions to collect freight charges, or that shippers are required to pay such charges even while they are litigating the merits of such defenses before the ICC. Such suggestions are present in the opinion of the Fifth Circuit in *Supreme Beef Processors, Inc. v. Yaquinto, supra*, 864 F.2d 388, 391-92, and should be addressed by the Court as a part of its resolution of the legal issues in these cases. Both the courts and the ICC repeatedly have held that shippers are entitled to assert unreasonableness issues defensively. The Fifth Circuit has misapplied its own precedents and those of this Court in suggesting that the remedy pursued by Primary Steel and sought by Supreme Beef is barred by these parties' failures to seek this relief in separate legal actions against the bankrupt carriers.

It is well established that shipper defendants in carrier actions to collect freight charges are entitled to assert as defenses either the contention that the rates sought to be collected are statutorily unreasonable or that collection of these rates would constitute a statutorily prohibited unreasonable practice. *United States v. Western Pacific Railroad, supra*, 352 U.S. at 71-73

(statute does not "bar reference to the Commission of questions raised by way of defense"); *Western Transportation Co. v. Wilson & Co.*, *supra*, 682 F2d at 1232 (separate claim procedures refer "only to actions seeking payment of money" and not to defenses). Given the fact that unreasonableness of rates and unreasonableness of practices under 49 USC § 10701(a) fall within the exclusive primary jurisdiction of the ICC, *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *United States v. Western Pacific Railroad*, *supra*, 352 U.S. 59, 68, the only forum in which these defenses may be addressed is the ICC.

In these circumstances, courts regularly have recognized that shippers pleading unreasonable rate or practice defenses to carrier collection actions in court are entitled to stays of the collection actions pending determination of their unreasonableness defenses by the ICC. *Western Transportation Co. v. Wilson & Co.*, *supra*, 682 F2d at 1231, 1232; *Seaboard System R.R. v. United States*, *supra*, 794 F2d at 639; *Interoceanic Commodities Corp. v. Chicago G.W. Ry. Co.*, 309 ICC 710, 612 (1960); *Bushman Dock & Term. v. Chesapeake & O. Ry. Co.*, 302 ICC 183, 186 (1950). Both the courts and the ICC also have recognized specifically that unreasonableness of a rate or practice is an affirmative defense to a carrier collection action, as opposed to an independent claim to be raised by counterclaim or separate suit. *In Re Penn Central Transportation Co.*, 477 F2d 841, 844 (3rd Cir. 1973), cert. den., 414 U.S. 885, 923 (1974); *Lawson Concrete Co. v. C. & N.W. Transp. Co.*, 367 ICC 109, 111 (1982).

Notwithstanding early statements that shippers alleging rates to be unreasonable were required to first pay the rates and then file reparation actions to recover them, later ICC decisions eliminated this requirement

by granting specific approval to the carriers' non-collection of rates ultimately found to be unreasonable. See, i.e. *Bradford Coal Co. v. Baltimore & O. R. Co.*, 305 ICC 761, 766-67 (1959); *New England Box Co. v. Boston & M.R.*, 305 ICC 133, 135 (1958); *Foremost Food & Chemical Co. v. Alton & S.R.*, 318 ICC 35, 39 (1962). Indeed, any such rule appears to have been ignored more often than followed. *City of New Orleans v. Southern Scrap Material Co.*, 704 F2d 755 at 757 (5th Cir. 1983); *Seaboard System R.R., Inc. v. U.S.*, *supra*, 794 F2d at 639; *Indiana Harbor Belt R. Co. v. Industrial Scrap Corp.*, 682 F.Supp 1041, 1042 (N.D. Ill. 1986); *United States v. Western Pacific Railroad*, *supra*, 352 U.S. at 71-73; *Western Transportation Co. v. Wilson & Co.*, *supra* 682 F2d at 1231-32; *General American Tank Car Corp. v. Eldorado Terminal Co.*, 308 U.S. 422, 433 (1940). In all of the cited cases, payment of rates on file with the ICC was deferred pending the ICC's determination of the reasonableness of rates or rate practices raised as defenses to payment.

There is no precedential support for statements such as those in the Fifth Circuit in *Supreme Beef* that "a court may not stay enforcement of the filed tariff rate on the ground that the shipper has pled unreasonableness" or that "a carrier is entitled to enforce the filed rates under the filed tariff doctrine and to seek payment of undercharges in the district court even while the reasonableness of the tariffs is challenged before the commission." *Supreme Beef Processors, Inc. v. Yaquinto*, *supra*, 864 F2d at 392, 391-92. The only case cited by the Fifth Circuit in support of these propositions is *Southern Pacific Transp. Co. v. City of San Antonio*, *supra*, 748 F2d 266. *Southern Pacific* arose out of this Court's opinion in *Burlington Northern v. U.S.*, 459 U.S. 131 (1982). It essentially enforced this Court's holding that reviewing courts lack the power to delay

the implementation of proposed rate increases found not to be unreasonable by the ICC. *Southern Pacific Transp. Co. v. San Antonio*, *supra*, at 748 F.2d 273.

In *Southern Pacific*, rail carriers filed collection actions against the shipper, the City of San Antonio, based upon tariffs reflecting rate increases which this Court had ordered left in effect pending the ICC's re-determination of a reasonable rate. A district court ruled that the rates provisionally approved by this Court and the ICC were the rates that should be applied. The court, however, stayed execution of its judgment to that effect pending the outcome of the ICC's reconsideration of those rates. *Southern Pacific*, *supra*, 748 F.2d at 269. The Fifth Circuit ordered that stay vacated. In principal part, the vacation order rested on the doctrine of non-interference with ICC jurisdiction expressed by this Court in its *Burlington Northern* opinion. *Southern Pacific*, *supra*, 748 F.2d at 273. The order also stated, however, that the filed rate system based on 49 U.S.C. § 10761(a), justified payment to the carriers of their filed charges provisionally approved by the ICC. *Id.* at 273-274 ("*Filed Rate Doctrine*"). This latter justification had not been expressed by the prior opinion of this Court in *Burlington Northern*.

The Fifth Circuit's citation of this portion of *Southern Pacific* in *Supreme Beef* as a basis for denying shippers their right to assert unreasonable practice defenses before the ICC represents a serious misapplication of this Court's *Burlington Northern* principles. *Burlington Northern* reflected this Court's concern that preventing future rate proposals from taking effect on the grounds of alleged unreasonableness would irrevocably prejudice carriers. Such prejudice would occur because of the carriers' lack of a remedy to recover revenue shortfalls from shippers for the period of litiga-

tion. *Burlington Northern v. U.S.*, *supra*, at 459 U.S. 139, 141-143. This irreparable harm to carriers, however, is not present in cases in which unreasonableness of a rate or rate practice is raised as a defense to carrier actions to collect published charges on past shipments. In that situation, carriers will always retain their collection remedy against the shipper if the shipper does not obtain a determination of unreasonableness from the ICC. There is no indication in *Burlington Northern* that this Court intended to foreclose shipper rights to raise the unreasonableness defenses to actions to collect charges on past shipments which this Court had recognized in *United States v. Western Pacific Railroad*, *supra*, 352 U.S. 59. See also, Brief for the United States as *Amicus Curiae* in No. 88-1958 (Dec., 1989 at 14-16).

Supreme Beef believes that affirmance of the Eighth Circuit decision below will resolve this issue as a matter of law. Primary Steel was permitted to litigate its unreasonableness practice arguments as a defense to the collection action by Maislin. It was not required either by the courts or the ICC to file a separate claim against Maislin or to pay over the amounts at issue pending the outcome of these proceedings. Supreme Beef maintains, however, that this Court's decision resolving this case should affirmatively confirm the rights of shippers to raise unreasonable practice issues as defenses to carrier collection actions and to stay any payment of the carrier charges at issue pending resolution of these defenses by the ICC. Such an affirmative holding would resolve any conflict between the law of the Eighth and Fifth Circuits on this point and eliminate future controversy in other circuits which might arise from the Fifth Circuit's opinion in *Supreme Beef*.

CONCLUSION

Supreme Beef Processors, Inc. respectfully requests that the determination of the Eighth Circuit be affirmed.

Respectfully submitted,

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